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In the Supreme Court of the United States

October Term, 1969

No. 585

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Petitioners,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

September, 1969

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Supreme Court
of the
United States

October Term, 1969

No. _____

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Petitioners,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari be granted

[1]Petitioners are the Brotherhood of Locomotive Firemen and Enginemen, a labor organization, and individual officers and members thereof: to-wit, T. L. McCollister, L. C. Hamilton, T. T. Jackson, Jr., Sidney Page, M. L. Williams, H. A. Stokes, and B. J. Poe.

Respondents are the Seaboard Coast Line Railroad Company, a Virginia corporation, and the Brotherhood of Locomotive Engineers, a labor organization.

This suit was instituted prior to the merger of the Brotherhood of Locomotive Firemen and Enginemen into the United Transportation Union on January 1, 1969, and pursuant to the terms of that merger, has continued to be prosecuted in the name of the Brotherhood of Locomotive Firemen and Enginemen.

to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on June 4, 1969, in companion cases which involve identical or closely related questions and which were decided by the Court of Appeals in a single opinion rendered June 4, 1969. Pursuant to Rule 23(5) of the Rules of this Court, a single petition for writ of certiorari is filed for both cases in which the parties are identical.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, covering both cases, was rendered June 4, 1969, and has not yet been reported. It appears in Appendix A to this petition, App. 1 - App. 24, *infra.*

The Order Denying Motion for Intervention of the U.S. District Court for the Middle District of Florida, Jacksonville Division, in Case No. 68-41-Civ.-J, dated February 5, 1968, is not reported and appears in Appendix D hereto, pp. App. 29 - App. 30, *infra.* The U.S. District Court for the Southern District of Florida, Miami Division, did not render an opinion in Case No. 68-101-Civ.-JE, and its Final Judgment appears in Appendix E hereto, p. App. 31, *infra.*

Jurisdiction

The judgments of the Court of Appeals were entered on June 4, 1969 (Appendices B and C hereto, pp. App. 25 - App. 27, *infra*). By order of Mr. Justice Black, the time for filing this petition for a writ of certiorari was extended from September 2, 1969, to and including September 12, 1969. (See Appendix F, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Does a federal District Court have jurisdiction of a claim by one union party to a tri-party collective bargaining contract entered into under the Railway Labor Act with the express auspices of the National Mediation Board for the purpose of solving a jurisdictional dispute, that the other two parties (the railroad carrier and the second union) have altered the tri-party contract in violation of the Railway Labor Act's mandatory procedures?

2. Where all parties to a tri-party labor agreement under the Railway Labor Act have agreed to renegotiate the agreement because the carrier party is merging with another railroad, and have agreed to arbitrate all disputes not resolved by such renegotiations, and have then commenced tri-party negotiations, but then two of the parties break off the tri-party negotiations and change the existing tri-party contract by bilateral agreement, which they then seek to enforce by federal District Court decree, does the federal District Court have jurisdiction of the excluded party's timely motion to intervene in the federal District Court case on the basis that the actions of the other two parties are in violation of the mandatory procedures and restrictions of the Railway Labor Act governing the alteration of existing labor agreements?

Statutes Involved

This case primarily involves the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C., Sections 151 *et seq.*, and particularly Section 2 First (45 U.S.C., Section 152 First), Section 2 Second (45 U.S.C., Section 152 Second), Section 2 Seventh (45 U.S.C. §152 Seventh), and Section 6 (45 U.S.C., Section 156) of that Act which provisions are as follows:

Section 2 First: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2 Second: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2 Seventh: "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6: "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of

said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Statement

The facts involved herein have a surface complexity, but are basically simple. Prior to July 1, 1967, there were two separate railroads, the ACL RR and the SAL RR.[2] On each railroad the craft of engineers was represented by the BLE; on each, the craft of firemen was represented by the BLF&E.

As this Court has had occasion to know from prior cases,[3] there is great mobility in the railroad industry

[2]The following abbreviations will be used in this petition, Atlantic Coast Line Railroad Company: *ACL RR;* Seaboard Air Line Railroad Company; *SAL RR;* Seaboard Coast Line Railroad Company: *SCL RR;* Brotherhood of Locomotive Firemen and Enginemen: *BLF&E;* and Brotherhood of Locomotive Engineers: *BLE.*

[3]*General Committee of Adjustment v. Missouri-Kansas-Texas RR.*, 320 U.S. 323 (1943); *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943).

between the two crafts of engineer and firemen which, in turn, causes so-called jurisdictional disputes. So it was on the ACL RR, and following the teaching of this Court's decisions in the *General Committee* cases,[4] these jurisdictional disputes were referred to the National Mediation Board which solved them, quite logically, by persuading all parties involved (i.e., the ACL RR, the BLE, and the BLF&E) to enter into tri-party contracts concerning the subjects of over-lapping interest.[5] These tri-party contracts provided that none of the parties could withdraw from the contract without the consent of the other two parties or without formal notice by one party to each of the other two parties and further handling in conformity with the Railway Labor Act, 45 U.S.C., Sections 151 *et seq.*

On July 1, 1967, the ACL RR and the SAL RR merged.[6] In anticipation of the merger, the BLF&E and the BLE entered into so-called "protective agreements" with the ACL RR and the SAL RR. (See Record, Vol. I, pp. 89-122.) These "protective agreements" were separate bilateral contracts, but were virtually identical in terms. They provided that the Merged Company (SCL RR) would take over and assume *all* existing collective bargaining contracts; that the existing contracts would be merged into new agreements with the Merged Company covering all employees in each craft, with consolidation of seniority

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[4] *Ibid.*

[5] E.g., the method of returning engineers to the ranks of firemen or of calling demoted engineers from the ranks of firemen to serve as engineers when the engineers' extra board becomes exhausted.

[6] See *Florida East Coast Ry. v. United States,* 242 F. Supp. 14 (M.D.Fla. 1965), reversed, *Seaboard Air Line RR. v. United States,* 382 U.S. 154 (1965); *Florida East Coast Ry. v. United States,* 259 F. Supp. 993 (M.D. Fla. 1966), affirmed, 386 U.S. 544 (1967).

rosters and districts, *through negotiations;* and that all disputes arising out of the interpretation or application of the "protective agreements" would be subject to final and binding arbitration.

Following the execution of these "protective agreements" and the merger of the two railroads on July 1, 1967, the Merged Company (SCL RR) and the two unions here involved (BLF&E and BLE) began tri-party negotiations to make the new agreements called for by the protective agreements. After continuing for several months, however, the SCL RR and the BLE broke off the tri-party negotiations, bargained together on a bilateral basis, and entered into a bilateral contract between the SCL RR and the BLE which did not purport to continue the existing tri-party contracts and, in effect, excluded the BLF&E from the benefits and protections of those tri-party contracts. (See Petition by Intervenors in Jacksonville Case and Complaint in Miami Case, Record, Vol. I, pp. 74-88, Vol. II, pp. 8-31.)

Needless to say, the BLF&E did not consent to the breaking off of the tri-party negotiations, protested against the conduct of the SCL RR and the BLE, and requested that the SCL RR refrain from implementing its new bilateral contract with the BLE until further negotiations could be held.

The SCL RR and the BLE at first agreed to delay such implementation while the parties negotiated, and did so for about a week from January 16, 1968, to January 23, 1968. In the meantime, various individual members of both the BLF&E and the BLE had brought suits in various state courts in Georgia and South Carolina to restrain

implementation of the new SCL RR - BLE bilateral contract. Temporary restraining orders were issued in some of these cases, all of which were subsequently dissolved.

In this situation, the BLE on January 29, 1968, brought suit against the SCL RR in the U.S. District Court for the Middle District of Florida, Jacksonville Division, seeking to require the SCL RR mandatorily to implement the new, bilateral contract it had executed following termination of the tri-party negotiations. No notice of this suit was given to the BLF&E by either the plaintiff, BLE, or the defendant, SCL RR. The litigation at least savored of collusion since there was no real dispute between the parties; both wanted the same result, to-wit, an order requiring implementation of the new, bilateral contract they had negotiated after excluding the BLF&E.[7] They promptly obtained such an order in the form of a preliminary injunction (Record, Vol. I, pp. 71-72) issued on January 30, 1968, requiring SCL RR to implement the new bilateral contract immediately.

Meanwhile, without knowledge of the Jacksonville litigation, the BLF&E filed suit on January 30, 1968, in the U. S. District Court for the Southern District of Florida,

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[7]See Record, Vol. I, p. 64, e.g., where SCL RR's counsel told the District Court in Jacksonville at the hearing on BLE's application for a preliminary injunction: "So we stand here between the Devil and the deep blue sea; but we feel that we can't deny the validity of this Agreement, *and the rightness of the Plaintiff's cause.*" (Emphasis added.)

SCL RR did oppose being required to implement the new contract in South Carolina where it had been enjoined from doing so by a South Carolina state court, and the preliminary injunction of the U.S. District Court in Jacksonville accommodated the Railroad in this regard and provided that it would not be effective as to the Railroad's operations in South Carolina until and unless the South Carolina state court's injunction were dissolved (Record, Vol. I, p. 71).

Miami Division, naming both the SCL RR and the BLE as defendants and seeking to enjoin implementation of the very contract which, unbeknownst to the BLF&E, the District Court in Jacksonville had enjoined to be implemented. (Record, Vol. II, pp. 8 - 31). The BLF&E did not seek an ex parte hearing or hearing-on-short-notice in this case, and, of course, adequate notice of this suit was given by BLF&E to both respondents.

Upon learning of the Jacksonville litigation and the preliminary injunction therein rendered, the BLF&E promptly sought to intervene in that case on February 1, 1968 (Record, Vol. I, pp. 72 - 88). The motion to intervene, however, was denied on February 5, 1968, on the basis that the motion to intervene involved a jurisdictional dispute which was not within the jurisdiction of the Court (Record, Vol. I, pp. 204 - 206). BLF&E then appealed from this Order Denying Motion For Intervention (Record, Vol. I, p. 206).

Thereafter the Miami case came on for hearing on the BLF&E's application for a preliminary injunction and the defendants' motions to dismiss for (1) failure to state a claim upon which relief could be granted; (2) lack of jurisdiction; and (3) res judicata.[8] The Court granted the motion to dismiss with leave to amend (Record, Vol. II, p. 107); the BLF&E declined to amend (Record, Vol. II, p. 108 - 109); and the Court entered Final Judgment dismissing the complaint with prejudice on April 5, 1968 (Record, Vol. II, p. 110). Again, the BLF&E appealed (Record, Vol. II, p. 111).

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[8]The res judicata contention was based on the Order Denying Motion For Intervention of the U.S. District Court in Jacksonville.

By a split decision (Circuit Judge Thornberry dissenting), the U.S. Court of Appeals for the Fifth Circuit affirmed both judgments, holding that the entire dispute was "not one for judicial consideration." (Appendix A, *infra*, p. App. 12).[9]

Reasons for Granting The Writ

This case involves novel and important questions under the Railway Labor Act as to the effect of a railroad merger on existing collective bargaining contracts. The Courts below have held, in effect, that such a merger destroys the prior settlement of jurisdictional disputes, which disputes had been resolved by means of formal triparty contracts entered into under the auspices of the National Mediation Board. Such a holding brings the underlying jurisdictional disputes back to life with renewed vigor, and will necessarily be disruptive to peaceful and harmonious labor relations in the railroad industry. This result, petitioners respectfully submit, is both undersireable in its effects on interstate railroad commerce and in conflict with controlling decisions of this Court and with prior decisions of the federal Courts of Appeals. Because of the importance of harmonious labor relations in the railroad - airline industry to the Nation's economy, this Court should grant certiorari and review the divided decision below, which petitioners submit is erroneous for the following reasons:

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[9]Nevertheless, of course, the Order of the District Court in Jacksonville requiring the SCL RR to implement its bi-lateral contract with the BLE was left undisturbed and in effect.

A. *The decision below conflicts with decisions of this Court and prior decisions of the federal Courts of Appeals holding that federal District Courts have jurisdiction to enforce compliance with the procedures and prohibitions prescribed by the Railway Labor Act for changing collective bargaining agreements.*

As this Court recently said in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 1115 (1969):

> "The heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor, 'to exert every reasonable effort to make *and maintain* agreements concerning rates of pay, rules, and working conditions, and to settle all disputes ***.'" (Emphasis added.)

This basic duty is enforced by the restrictions and requirements of Section 2 Seventh (45 U.S.C. §152 Seventh) and Section 6 (45 U.S.C. §156) of the Act which require that changes in existing collective bargaining contracts in the railroad industry be accomplished only by formal notice on "the representatives of the parties interested in such intended changes" (emphasis added; Section 6 of Railway Labor Act, 45 U.S.C. §156), good faith bargaining thereafter, compulsory mediation by the National Mediation Board thereafter at its option or the option of any of the parties, the proffer of voluntary arbitrary by the National Mediation Board if all else fails, and finally the convocation of a National Emergency Board at the option of the President of the United States as a last resort. "While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 89 S. Ct. at 1115.

A majority of the Court of Appeals below held that the District Courts in this case had no jurisdiction to adjudicate petitioners' claim that the Merged Company (SCL RR) and BLE had violated their rights under the foregoing provisions of the Railway Labor Act[10] by breaking off tri-party negotiations concerning the renegotiation of tri-party contracts and thereafter, abrogating or changing those contracts by bilateral agreement between themselves. The asserted basis for this holding is that the underlying dispute is a so-called "jurisdictional" dispute within the exclusive jurisdiction of the National Mediation Board.

Petitioners respectfully submit that this holding completely misconstrues the situation before the Court and ignores ~~that~~ the fact that the so-called jurisdictional dispute between BLE and BLF&E had already been submitted to the National Mediation Board, and had been solved under the auspices of that Board by means of formal tri-party contracts. Upon creation of the tri-party contracts, the jurisdictional disputes ceased to exist. What remained were collective bargaining contracts which specifically provided that they could not be altered except by following the procedures of the Railway Labor Act, i.e., by giving notice to *all* parties and negotiating thereafter on a tri-party basis.

Respondents apparently at first recognized their legal obligations in this regard when the necessity to alter the tri-party contracts arose due to the merger of the ACL RR

[10]Petitioners' Complaint and Motion for Intervention particularly referred to Sections 2 Seventh, and Section 6 of the Railway Labor Act, 45 U.S.C., §§ 152 Seventh, and 156 (Record, Vol. I, p. 84; Vol. II, p. 27).

with the SAL RR. Thus, tri-party negotiations were commenced by the parties after the merger, but these continued for only a few months, when the respondents became impatient, broke off those negotiations, and entered into a bilateral agreement which altered and abrogated the tri-party agreements in ways deemed detrimental by the BLF&E. Thereafter the BLE sought and obtained the aid of the District Court in Jacksonville to put the new bilateral contract into immediate effect.

Petitioners suggest that, at the very least, it is clear that if the District Court in Jacksonville had jurisdiction to order the bilateral contract into effect, it had comparable jurisdiction to determine petitioners' claims that the contract was invalid for failure of the parties to follow the procedures of the Railway Labor Act.

What is involved here is the basic validity of tri-party contracts under the Railway Labor Act. Such contracts, it is true, are not the norm, but they have been used by the National Mediation Board most effectively to solve troublesome jurisdictional disputes in a peaceful, constructive manner. They are a very useful tool devised by the National Mediation Board to meet its responsibilities as described by this Court in the *General Committee* cases,[11] yet the decision of the Court of Appeals below undermines and severely limits their use for such purposes in the future. The effect on future industrial peace in the railroad industry can only be adverse.

Because the jurisdictional disputes between the BLE and BLF&E had been resolved by the tri-party contracts, petitioners submit that the Court of Appeals' majority

[11]Note 3, *supra*.

opinion's reliance on the *General Committee*[12] decisions of this Court is misplaced. Petitioners have no quarrel with those decisions, but say they have no application here where the question is not how to resolve a raw jurisdictional dispute as to which union represents which employees or which subjects overlapping two crafts are within the exclusive jurisdiction of which craft. Rather, the question here is how to renegotiate a tri-party contract where such renegotiation is necessitated by a merger of the carrier party. All parties involved (the SCL RR, the BLE and the BLF&E) had agreed to renegotiate them, and had agreed that disputes in renegotiating would be subject to final and binding arbitration (see protective agreements, Record, Vol. I, pp. 98 - 99, 114). Pursuant to this agreement, all parties commenced tri-party negotiations, but then, when the negotiations did not suit two of the parties, those two broke off and took action by themselves which — especially when buttressed by a federal court injunction — completely frustrated any resort to arbitration by the BLF&E.

The majority below admit that "***it well may be that the firemen are entitled to negotiate regarding subjects of the Engineers - Seaboard agreement, [but] the issue is not one for judicial consideration." (Slip opinion, p. 13; Appendix A, *infra*, p. App. 12). Nevertheless, the Engineers have been granted the aid of the Jacksonville District Court's *jurisdiction* and process (with SCL RR's acquiescence) to sanction their joint exclusion of BLF&E from the tri-party negotiations. This is hardly even-handed application of the law.

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[12]Note 3, *supra*.

Petitioners suggest instead, that the analysis in Judge Thornberry's dissenting opinion represents the correct interpretation of this Court's decisions concerning the jurisdiction of a federal court to enforce the mandatory procedures of the Railway Labor Act. Judicial enforcement of such procedures and prohibitions of the Railway Labor Act concerning the making of agreements (which would include, petitioners say, the renegotiating of agreements) has been recognized at least since 1937. *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Brotherhood of Ry. & S.C., Etc. v. Florida E.C. Ry. Co.*, 384 U.S. 238 (1966); *McElroy v. Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7 Cir. 1968), cert. den., 393 U.S. 1015 (1969); *Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 337 F.2d 127 (D.C. Cir. 1964); *Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen*, 336 F.2d 172 (5 Cir. 1964), cert. den., 379 U.S. 990 (1965); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2 Cir. 1964), cert. den., 379 U.S. 817 (1964); *Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America*, 269 F.2d 726 (5 Cir. 1959), cert. den., 361 U.S. 899 (1959); *Railroad Yardmasters of America v. Pennsylvania Ry. Co.*, 224 F.2d 226 (3 Cir. 1955).[13]

It is petitioners position, as it was dissenting Judge Thornberry's in the Court below, that the decision here involved is in conflict with each of the foregoing decisions. These conflicts should be resolved by this Court.

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[13]Most of these cases involve only traditional bilateral disputes between the Employer and a Union about changing collective bargaining contracts; however, *McElroy v. Terminal Railroad Association of St. Louis, supra*, and *Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America, supra*, both involved tri-party disputes similar to the one at Bar.

B. *The decision below is in conflict with national labor policy, as expressed in the Railway Labor Act and decisions of this Court, favoring voluntary arbitration as a preferred method for settling labor disputes affecting inter-state commerce.*

The decision of the majority of the Court of Appeals below completely frustrates any possibility of settling the dispute here involved by voluntary arbitration, despite the fact that all three parties involved have formally agreed by contract to arbitrate all disputes arising out of the necessary renegotiation of the collective bargaining contracts occasioned by the merger of ACL RR and SAL RR into the SCL RR.

When the prospective merger made it apparent that existing contracts on the two merging railroad would have to be renegotiated, both the BLF&E and the BLE entered into "protective agreements" with the merging railroads whereby the railroads agreed that the Merged Company (SCL RR) would "take over and assume *all* contracts" between the merging carriers and their labor organizations (Record, Vol. I, pp. 96 - 97, 113). It was further agreed that these contracts would be merged into new agreements *through negotiations* (Record, Vol. I, pp. 96 - 97, 113), and that any dispute with respect to the interpretation or application of the protective agreements would be subject to final and binding arbitration (Record, Vol. I, pp. 98 - 99, 114).

It is true that the BLE protective agreement is a separate contract from the BLF&E's. But both are virtually identical in terms (compare Record, Vol. I, pp. 89 -

100 with Record, Vol. I, pp. 110 - 115). And both provide for voluntary arbitration of disputes concerning renegotiation of the existing contracts assumed by the Merged Company (SCL RR).

Accordingly, a reasonable, straight-forward method for solving this dispute was agreed upon by all three parties here involved prior to the existence of the dispute: tri-party arbitration. See and compare *Transportation-Communication Employees Union v. Union Pac. R. Co.*, 385 U.S. 157 (1966).

However, the action of SCL RR and the BLE in break-off tri-party negotiations, and entering into a bilateral contract that changed the substance of the existing tri-party contracts, obviously frustrated and rendered arbitration by the BLF&E alone impossible. Of course, up until the time the SCL RR actually implemented its new contract with BLE, there was still a possibility of resolving the dispute through negotiations that were continuing between BLF&E and SCL RR. For this reason, BLF&E requested both SCL RR and BLE to delay implementation of their new agreement beyond the date of January 16, 1968, when it was supposed to go into effect. At first, both SCL RR and BLE did agree to this request, and the implementation was delayed by them for a week from January 16th to January 23, 1968. BLE then refused to continue such delay and brought the instant suit in the U.S. District Court in Jacksonville, without notice to the BLF&E. That Court then granted a preliminary injunction within 24 hours requiring implementation of the new agreement (Record, Vol. I, pp. 71 - 72).

At this point, clearly, any possibility of settling the dispute by voluntary arbitration was completely frustrated. In the face of the District Court's decree, BLF&E could not hope to obtain relief by arbitration. Instead, it sought to intervene in the District Court litigation, as it obviously had to, but was rejected.[14]

Petitioners submit that the decisions below, frustrating voluntary arbitration of this dispute, are in conflict with prevailing national labor policy favoring voluntary arbitration as a preferred method of solving labor disputes affecting interstate commerce. The Railway Labor Act refers to voluntary arbitration throughout its text (45 U.S.C. §§152 First, 155 First (b), 155 Third, 157, 158, and 159). This Court has recognized that Congress has expressed a policy favoring settlement of labor disputes affecting interstate commerce by voluntary arbitration. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 450-451 (1957); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf N. Co.*, 363 U.S. 574, 578, 582 (1960); *United Steelworkers of America v.*

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[14]While BLE catagorically opposed BLF&E's intervention, SCL RR indicated somewhat hazily its favoring the BLF&E's being allowed to intervene (Record, Vol. I, pp. 179, 182):

"The Court: In other words, you are not taking the same position as B.L.E. with reference to the fact of intervention—

"Mr. Maness [SCL RR counsel]: That is correct. We—

"The Court: —you think it would accelerate the disposition of the case to have intervention?

"Mr. Maness: We think so."

and

"Mr. Maness: * * * You see, we take the position, even though we agreed to, or would like to see, the intervention of the Firemen's organization here, we still contend strongly that there is no merit to their position, and we're ready to go—."

Enterprise W. & C. Corp., 363 U.S. 593, 596 (1960); *Local 174, Teamsters, Etc. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-549 (1964).

Petitioners submit that the decision below, frustrating settlement of this dispute by voluntary arbitration, is in conflict with national labor policy as expressed in the Railway Labor Act and as stated in the foregoing decisions. At the very least, the District Court below in Jacksonville should have permitted intervention by the BLF&E and preserved the *status quo* pending tri-party arbitration. This Court should grant certiorari to review the application of national labor policy favoring voluntary arbitration to the situation here involved.

Conclusion

This case presents important issues concerning the jurisdiction of federal District Courts to compel enforcement of the procedures and restrictions of the Railway Labor Act governing the making and alteration of collective bargaining agreements. The agreements here involved are not mere bilateral contracts, but are tri-party agreements entered into under the auspices of the National Mediation Board to settle jurisdictional disputes. The importance of their stability, and the importance of the future availability of such contracts to settle jurisdictional disputes, is greater than that of the normal bilateral contract affecting only one union. The decision below, which undermines the stability and future use of such tri-party contracts, and which frustrates national labor policy favoring voluntary arbitration of labor disputes in the railroad industry, should be reviewed by this Court.

Respectfully submitted,

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and

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Attorneys for Petitioners

September, 1969

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition For Writ of Certiorari was served by air mail on JOHN WELDON, ESQ., and EDWARD A. CHARRON, ESQ., attorneys for respondent Seaboard Coast Line Railroad Company, 500 Water Street, Jacksonville, Florida 32202, and by regular mail on ALLAN MILLEDGE, ESQ., and RICHARD L. HORN, ESQ., attorneys for respondent Brotherhood of Locomotive Engineers, 1300 Northeast Airlines Bldg., 150 S.E. 2nd Ave., Miami, Fla. 33131, this 11th day of September, 1969.

Neal P. Rutledge

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit in Cases Nos. 26043 and 26044, Rendered June 4, 1969:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26043

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Appellants,

—v.—

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Florida

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No. 26044

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Appellants,

—v.—

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(June 4, 1969)

Before THORNBERRY and DYER, Circuit Judges, and KEADY, District Judge.

DYER, Circuit Judge: The Brotherhood of Locomotive Firemen and Enginemen [Firemen] and the Brotherhood of Locomotive Engineers [Engineers] had a history of tripartite collective bargaining negotiations and agreements with the Atlantic Coast Line Railroad Company [ACL]. The ACL later merged with the Seaboard Air Line Railroad Company [SAL], which had no such history of tripartite agreements to form the Seaboard Coast Line Railroad Company [Seaboard]. In anticipation of the merger, both unions separately entered into employee protective agreements, providing for the merger and consolidation of collective bargaining agreements existing on the constituent railroads through negotiations covering all employees of the merged company in each craft. These companion appeals present the question of whether following the merger, tripartite negotiations by the Firemen, the Engineers and Seaboard were required. We hold that the Engineers and Seaboard could bilaterally negotiate an agreement relating to the consolidation of seniority rosters for engineer employees and affirm.

Prior to the merger, both the Firemen and the Engineers had collective bargaining agreements [Schedule Agreements] with ACL regulating wages, rules and working conditions for their respective crafts. Portions of the Engineers' Schedule Agreement were tripartite in nature, with the Firemen having participated in negotiations and

agreed to the terms.[1] Changes in these provisions required thirty days' notice to each of the other parties with further handling in conformity with the procedures of the Railway Labor Act, 45 U.S.C.A. §§ 151 *et seq.* Incorporated into the Engineers' Schedule Agreement with ACL was a mediation agreement between the unions and the ACL from which no party could withdraw without the consent of the other two.[2]

Both unions had complementing collective bargaining agreements with SAL, although these agreements were not tripartite. On the SAL the Engineers had separate yard and road seniority rosters, with the Firemen having a like distinction in their rosters.

The merger of ACL and SAL into Seaboard wended its way through the Interstate Commerce Commission and the courts over a period of seven years.[3] In approving the merger in 1963, the ICC prescribed, as required by 49

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[1]The provisions related to the method of applying the mileage regulation of an engineer who during a given month worked both as an engineer and as a fireman, the penalty to be imposed when engineers or firemen failed to register the correct mileage, the method of calling demoted engineers for service when the engineers' extra list became exhausted and penalties to be imposed upon an employee who is out of place for call for service as an extra engineer, and the method to be used in returning engineers to the rank of fireman.

[2]The subject of the agreement, Mediation Agreement A-1607, was the maximum and minimum mileage to be accredited to the engineers' extra board.

[3]On May 19, 1960, the two railroads applied for merger with the Interstate Commerce Commission, and on December 13, 1963, the ICC approved the merger. 320 I.C.C. 122. A three-judge district court set aside the order approving the merger, *Florida East Coast Ry. v. United States*, M.D. Fla. 1965, 242 F. Supp. 14, but the Supreme Court reversed and remanded the case to the district court, *Seaboard Air Line RR. v. United States*, 1965, 382 U.S. 154, which thereafter approved the merger, *Florida East Coast Ry. v. United States*, M.D. Fla. 1966, 259 F. Supp. 993, *aff'd*, 1967, 386 U.S. 544, which became effective July 1, 1967.

U.S.C.A. § 5(2)(f),[4] minimal employee protective conditions similar to those imposed in other mergers. The Firemen, Engineers, ACL and SAL, however, entered into separate employee protective agreements, authorized by section 5(2)(f), which provided greater employee protections than those imposed by the ICC. On November 3, 1966, the Firemen, represented along with seventeen other unions by the Railway Labor Executives' Association, entered into an Agreement for Protection of Employees in Event of Merger of SAL and ACL [Firemen's Protective Agreement], which had been negotiated with representatives of both SAL and ACL. One week later, the Engineers separately entered into a nearly identical protective agreement [Engineers' Protective Agreement] with the two railroads.

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[4]Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C.A. § 5(2)(c), requires the ICC in passing upon applications for mergers to give weight to various considerations, among which is "the interest of the carrier employees affected." Section 5(2)(f) of the Act states that:

> "(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The purpose of the two protective agreements was "to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in services, facilities and operations involved in such merger." In nearly identical terms the protective agreements provided for the consolidation of seniority rosters according to craft through negotiations covering all employees of the merged company in each craft. The Firemen's Protective Agreement provided that the existing ACL and SAL

> agreements will be merged into new agreements through negotiations covering all employees of the Merged Company in each craft with consolidation of seniority rosters and seniority districts for each class and craft of employees.

The Engineers' Protective Agreement provided that

> such agreements will be merged into a new agreement through negotiations covering all employees of the Merged Company in each craft with consolidation of seniority rosters and seniority districts for engineers.

Both protective agreements constituted separate contracts with the labor organization and railroads signatory to them. In addition to requiring negotiations and consolidation of seniority rosters and districts, the protective agreements required Seaboard to "take over and assume all contracts, schedules and agreements" between the constituent railroads and the labor organizations.

The negotiations relating to fireman and engineer employees did not fare well, due to the close relationship of the two crafts. There is a high degree of intercraft

mobility between firemen and engineers, with some individuals working as a fireman one day, an engineer the next, and a fireman again on the following day. Typically an individual holds seniority both as a fireman and as an engineer. The close relationship has stimulated frequent disputes over the years regarding the rules governing movement between the crafts such as rules governing the demotion of engineers, the return of demoted engineers to their work, the promotion of firemen to engineer, maximum mileage regulations and the like. Eventually these disputes have been resolved, as on the ACL through tripartite agreements or on the SAL through separate complementing agreements. The merger required their resolution again, since there were points of conflict in agreements both within one craft and between the two crafts on the two railroads. One subject of conflict was the consolidation of seniority districts and rosters, since on the SAL there was separate yard and road seniority for both firemen and engineers while on the ACL there was no such distinction.

Initially, Seaboard, the Firemen and the Engineers commenced three-way discussions in an attempt to arrive at mutually acceptable agreements for each craft. These proved unsuccessful, whereupon the Engineers and Seaboard commenced bilateral negotiations and eventually reached agreement. The Engineers and Seaboard agreed upon a new Schedule Agreement, redefining the rules, rates of pay and working conditions of engineers, and an Implementing Agreement, providing for the consolidation of seniority districts and seniority rosters. The Implementing Agreement provided for the consolidation of thirty-one seniority districts into six, with one seniority roster for each district.

The Engineers-Seaboard Schedule Agreement and Implementing Agreement were to go into effect January 16, 1968, but because of threatened litigation by the Firemen, implementation was delayed until January 23, 1968.[5] After the week of delay had passed, Seaboard still refused to implement its agreement with the Engineers, so on January 29, 1968, the Engineers brought suit in the United States District Court for the Middle District of Florida to compel Seaboard to place the agreement into effect. On the following day, January 30th, the District Court entered a preliminary injunction requiring Seaboard to implement the agreement.

On the same day that the preliminary injunction was entered, January 30th, the Firemen, who were unaware of the Engineers' suit in the Middle District of Florida, brought suit in the United States District Court for the Southern District of Florida seeking to enjoin the implementation of the Engineers-Seaboard agreement. Upon learning of the Engineers' suit, on February 1, 1968, the Firemen moved to intervene in the Engineers' suit against Seaboard in the Middle District. A hearing on the motion was held the next day, and on February 5, 1968, the District Court denied the motion for intervention, holding that the motion presented a jurisdictional dispute between the Firemen and the Engineers which the National Mediation Board, not a district court, has exclusive jurisdiction to resolve.

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[5]At the same time, certain individuals commenced litigation in Georgia and South Carolina state courts to prevent the agreements from going into effect. The *ex parte* restraining orders in those cases were eventually dissolved.

Thereafter in the Southern District, the Engineers and Seaboard moved to dismiss the Firemen's complaint for failure to state a claim upon which relief could be granted, lack of jurisdiction over the subject matter, and res judicata because of the Middle District's order denying intervention. A hearing on the motion to dismiss was held on February 8th, and on February 12th the District Court, without stating its reasons, granted the motion to dismiss with leave to amend. One month later the Firemen filed notice of appeal from the order dismissing their complaint; then on March 19, 1968, they filed an Election to Stand on Original Complaint and Alternative Motion for Further Hearing or Entry of Final Judgment. The District Court obliged their last request by entering an order dismissing their complaint with prejudice, from which the Firemen on April 9th filed a second notice of appeal.

Preliminarily we dispose of the motion of the appellees to dismiss the appeal from the Southern District's case, No. 26,044. The appellees urge that the appeal should be dismissed as taken from a non-appealable order under the rule established in *Bush v. United Benefit Fire Ins. Co.*, 5 Cir. 1963, 311 F.2d 893. The appellees construe *Bush* as holding that the District Court lacked jurisdiction to enter its second order of final judgment, from which notice of appeal also was filed, because of the pendency of appeal from the first non-appealable order. This construction is drawn by the appellees from the citation in *Bush* of *Merritt-Chapman & Scott Corp. v. City of Seattle*, 9 Cir. 1960, 281 F.2d 896, which the Ninth Circuit subsequently overruled in *Ruby v. Secretary of United States Navy*, 9 Cir. 1966, 365 F.2d 385. Reliance on *Bush* is misplaced, however, as it was merely held there that a certificate under Rule 54 (b), Fed. R. Civ. P., could not make an inter-

locutory order final for the purpose of permitting an appeal. "[A] certificate of the trial judge under that rule cannot have the effect of conferring jurisdiction where none is given by statute or of withdrawing jurisdiction where the statute confers it." *King v. California Co.*, 5 Cir. 1955, 224 F.2d 193, 197, also cited in *Bush, supra* at 894 n. 1. In the instant case the appeal is before this Court on two notices of appeal, the first of which was premature and the second of which was proper. In such a circumstance we may simply strike the first notice and consider the appeal on the basis of the second. *Cf. United States v. Crescent Amusement Co.*, 1944, 323 U.S. 173, 177-78.

The appeal from the Southern District in large part depends upon the correctness of the Middle District's decision. The Firemen's Southern District complaint seeking an injunction against enforcement of the Engineers-Seaboard agreement was dismissed without expressing the reason upon a motion stating three related grounds for dismissal, *i.e.*, failure to state a claim upon which relief could be granted, lack of jurisdiction over the subject matter and res judicata; each of which has a measure of validity.

The Firemen and the Engineers are the certified bargaining agents for their respective crafts. If the Engineers-Seaboard agreement related solely to engineers, the principle of exclusive representation would indicate that the Firemen could state no claim upon which relief against its enforcement could be granted. Since the crafts of engineer and fireman are interrelated, however, a more accurate statement of why relief could not be granted would be that the claim involves an inter-union representational dispute which district courts have no jurisdiction to resolve.

If the Middle District correctly denied the motion to intervene in the Engineer's suit, the Southern District's dismissal of the complaint was proper both on the ground of lack of jurisdiction, which was the Middle District's ground for denial of intervention, and on the ground of res judicata. The motion to dismiss and the motion to intervene were virtually identical, raising the same issues regarding a justiciable interest of the Firemen in the Engineers-Seaboard agreement. The principles of res judicata are applicable to fully litigated issues raised by a motion to intervene. *Cheyenne River Sioux Tribe of Indians v. United States*, 8 Cir. 1964, 338 F.2d 906, 911, *cert. denied*, 1965,382 U.S. 815, and res judicata applies to the issue of jurisdiction, *Hicks v. Holland*, 6 Cir. 1956, 235 F.2d 183, *cert. denied*, 1956, 352 U.S. 855; *cf. Brotherhood of Locomotive Firemen & Enginemen v. Louisville & Nashville R.R.*, 6 Cir. 1968, ____ F.2d ____ [Nos. 17,588 & 18,479, Aug. 28, 1968], *cert. denied*, 1969, 37 U.S.L.W. 3262.

By challenging the validity of the Engineers-Seaboard agreement in their attempt to intervene in the Engineers' Middle District suit to enforce it, the Firemen seek to bring themselves within the narrow scope of judicial intervention in railway labor disputes. Judicial consideration of railway labor disputes is rare, particularly in representation disputes where the National Mediation Board has exclusive jurisdiction. *Switchmen's Union of North America v. National Mediation Bd.*, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61; *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 1943, 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76; *General Committee of Adjustment v. Southern Pacific Co.*, 1943, 320 U.S. 338, 64 S.Ct. 142, 88 L.Ed. 85. Although courts have jurisdiction to

settle a dispute which poses a genuine issue as to the validity of a collective bargaining agreement, and not its interpretation, *Order of Ry. Conductors & Brakemen v. Switchmen's Union of North America*, 5 Cir. 1959, 269 F.2d 726, 729, and cases collected *id.* at n. 5, "district courts have no such authority where 'validity' of the contract depends upon the merits of a representational dispute." *Division No.* 14, *Order of R.R. Telegraphers v. Leighty*, 4 Cir. 1962, 298 F.2d 17, 19, *cert. denied*, 1962, 369 U.S. 885.

The Firemen contend that the Engineers-Seaboard agreement is invalid because it changes the subject matter of pre-merger tripartite agreements from which no party could withdraw without the consent of the Firemen or from which withdrawal could be accomplished only upon thirty days' notice and further proceedings under the Railway Labor Act. The Firemen argue that the subject matters of the pre-merger tripartite agreements were such that changes in their provisions inexorably affect both the Firemen and the Engineers. They assert that because their rights were fixed by the pre-merger agreements and both Seaboard and the Engineers were required to maintain pre-merger agreements in effect until changed following the merger, the rights of the Firemen under those agreements could not be altered through bilateral negotiations and agreements between the Engineers and Seaboard. Thus the Firemen claim the right to negotiate along with the Engineers and Seaboard regarding those matters covered by the pre-merger tripartite agreements, and that the bilateral agreement between the Engineers and Seaboard is invalid because the Firemen were neither a party to its negotiation nor have consented to it. We disagree.

While it well may be that the firemen are entitled to negotiate regarding subjects of the Engineers-Seaboard agreement, the issue is not one for judicial consideration. The determination as to which labor organization may treat with a railroad regarding a particular issue because of "an asserted overlapping of the interests of two crafts," *General Committee of Adjustment v. Missouri-Kansas-Texas R.R., supra* at 334, is a representational dispute within the exclusive jurisdiction of the National Mediation Board, whether the dispute is between two unions, *id.*, or within one union, *Division* 14, *Order of R.R. Telegraphers v. Leighty, supra*, or following a merger, *id.*; *Brotherhood of Ry. & Steamship Clerks v. United Air Lines, Inc.*, 6 Cir. 1963, 325 F.2d 576.

Although a district court at times may have jurisdiction to enjoin unilateral changes in the status quo established by collective bargaining agreements, *Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks*, 1930, 281 U.S. 548, a merger by its very nature requires changes in the status quo. Were it otherwise, the employee protective agreements negotiated by both the Firemen and the Engineers would have been unnecessary. Here the merger required a consolidation of the rights of the Firemen and the Engineers on the constituent railroads, with a merger of conflicting rights of each union as against the merged railroad and vis-a-vis the other union. The Engineers have consolidated their prior agreements through a new agreement which on its face applies only to engineer employees, although it indirectly affects fireman employees. The negotiations through which the agreement was reached were held bilaterally, as the separate employee protective agreements by providing for negotiations "in each craft" obviously contemplated and the prin-

ciple of exclusive representation would seem to require. *See Virginian Ry. v. System Federation No.* 40, 1937, 300 U.S. 515, 548; *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 8 Cir. 1963, 314 F.2d 424, 431.

This Court cannot say that simply because portions of the subject matter of the Engineers-Seaboard agreement formerly were the subject matter of tripartite agreements they necessarily must remain the subject of tripartite negotiations following the merger. We can perceive no distinction between the jurisdiction of a district court to resolve a dispute over whether a particular subject matter is within the representational jurisdiction of one labor organization rather than another, and the jurisdiction of a district court to resolve a dispute over whether a particular subject matter is within the concurrent representational jurisdiction of two labor organizations. A district court has jurisdiction to resolve neither dispute, the exclusive forum being the National Mediation Board. Underlying the issue of whether the provisions of the Engineers-Seaboard agreement should be in a two-party or a three party agreement, having been in bipartite agreements on one constituent railroad and tripartite agreements on the other prior to the merger, is the necessity of determining whether the provisions are within the jurisdiction of one union or the other or both, for the provisions are not beyond dispute within the jurisdiction of one bargaining representative or the other. Only the National Mediation Board has jurisdiction to resolve this underlying issue. Thus the asserted "invalidity" of the Engineers-Seaboard agreement depends upon the determination of a jurisdictional dispute between two railway labor organizations, a matter which a district court has no jurisdiction to decide.

The Firemen's motion to intervene in the Middle District litigation constituted an attempt to litigate a jurisdictional dispute between two unions in a federal court and was properly denied for lack of jurisdiction. *Stein v. Wirtz*, 10 Cir. 1966, 366 F.2d 188; *Bantel v. McGrath*, 10 Cir. 1954, 215 F.2d 297; *Rose v. Brotherhood of Ry. & Steamship Clerks*, 4 Cir. 1950, 181 F.2d 944; *Hobson v. Hansen*, D.D.C. 1968, 44 F.R.D. 18. The Firemen's Southern District complaint therefore was properly dismissed for lack of jurisdiction and as res judicata

AFFIRMED.

THORNBERRY, Circuit Judge, dissenting:

The Firemen (Brotherhood of Locomotive Firemen and Enginemen) maintain that the implementation of the new contract between the Engineers (Brotherhood of Locomotive Engineers) and the railroad abrogates certain tripartite agreements and a formal Mediation Agreement entered into by both unions and the carrier. They argue that the federal courts have jurisdiction to decide the controversy because the railroad and the Engineers have thereby violated an express mandate of the Railway Labor Act. This is that agreements must be carried forward until changed in accordance with Section 2, Seventh and Section 6 of the Act, 45 U.S.C. § 152, Seventh and § 156. In the courts below, appellees successfully contended that the federal courts were without jurisdiction and that the new agreement consummated between them simply "affects" the Firemen and those they represent. The majority of this Court has concluded that the Firemen's claim falls within the exclusive jurisdiction of the National Mediation Board and that the courts below were therefore without jurisdiction. Believing that the Firemen's claim falls within the jurisdiction of the federal courts, I respectfully dissent.

In concluding that the courts are without jurisdiction, the majority has characterized the controversy as a "jurisdictional dispute," which the Supreme Court has held to be within the exclusive jurisdiction of the National Mediation Board. *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 1943, 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76; *General Committee of Adjustment v. Southern Pacific Co.*, 1943, 320 U.S. 338, 64 S.Ct. 142, 88 L.Ed. 85; *accord, Switchmen's Union of North America v. National Mediation Board*, 1943, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. The *General Committee* cases likewise involved disputes between the Engineers and the Firemen, each claiming authority to treat with the railroad on a particular issue. When the Firemen and the railroad entered into agreement on the disputed issue, the Engineers brought suit in the district court to set aside the contract on the ground that the railroad had violated the Railway Labor Act by bargaining with the wrong employee representative. See Section 2, Ninth, 45 U.S.C. § 152, Ninth. The Court held that the federal courts were without jurisdiction to resolve the controversy, reasoning:

> It is clear from the legislative history of § 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or groups of employees. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board.

The Court further stated:

> In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied.

General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., supra, 320 U.S. at 336-37, 64 S.Ct. at 152-53.

The typical jurisdictional or representation dispute is over control of membership and work and is characterized by an attempted invasion by one union into the province of another. "It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins." *General Committee of Adjustment v. Southern Pacific Co., supra* 320 U.S. at 343, 64 S.Ct. at 145. Or, it may involve "an asserted overlapping of the interests of two crafts" necessitating "a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority." *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., supra*, 320 U.S. at 334-35, 64 S.Ct. at 151. There is no question, and the Firemen concede as much, that in the absence of the formal Mediation Agreement and tripartite agreements, the Firemen's claims of the right to be heard in bargaining, of the right to be a party to any agreement reached in certain areas between the Engineers and the carrier, and of the invalidity of any contract reached without them would present

a jurisdictional dispute. It would involve "an asserted overlapping of the interests of the two crafts" and would require an administrative determination whether the Firemen, the Engineers, or both, have authority to deal with the carrier on the disputed issues.

But the present controversy involves more. Unlike the *General Committee* cases,[1] the dispute centers around the Firemen's claim that the appellees have abrogated existing labor contracts they have entered with the Firemen. These agreements include a series of tripartite agreements and a formal Mediation Agreement regulating matters within the jurisdiction of *both unions* on the former ACL. The formal Mediation Agreement, A-1607, was the result of a "major dispute" between the parties wherein the National Mediation Board rendered its statutory services resulting in compromise between the carrier and the two unions. This became part of the Schedule Agreements the Engineers and the Firemen each had with the carrier and expressly provided:

> This agreement shall become effective as of January 1, 1945 and remain in effect until changed in accordance with the Railway Labor Act, amended.

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[1]Those cases did not involve the abrogation of existing agreements between the parties. Significantly, the Court stated:

> For many years the two Brotherhoods had an agreement which established rules and regulations on these subjects and which provided machinery for resolving disputes which might arise between them. *This agreement was cancelled in 1927. The present dispute arose since that time . . . . General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., supra* 320 U.S. at 325-26, 64 S.Ct. at 147. (Emphasis added)

and further that:

> None of the parties hereto may withdraw except with the consent of each of the other parties.

Other tripartite agreements between the ACL, the Firemen and the Engineers provided that they:

> . . . shall remain in effect subject to the serving of thirty (30) days written notice by any party upon each of the other two parties, further handling to be in conformity with the Railway Labor Act, as amended.

These agreements, entered by the three parties under the auspices of the National Mediation Board, established the zones where the two unions have concurrent authority. The subjects of those agreements fall within the province of both unions. As to these subjects, the Board sponsored, and parties accepted, tripartite agreement.[2] The claims of the Firemen predicated upon these agreements do not require the adjudication of a jurisdictional dispute between the two unions because "the zones where they have joint authority," *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., supra* 320 U.S. at 335, 64 S.Ct. at 151, have been authoritatively determined. No further administrative adjudication is required.

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[2]In view of the rights conferred upon the Firemen as a party to these agreements, the alternative theory advanced by appellees that the Firemen are without standing to contest the Engineer-carrier agreement is without merit. The new Engineer-carrier agreement allegedly abrogates the Firemen's rights under the tripartite agreements in violation of the Railway Labor Act, and therefore the new contract cannot be said to "merely affect" the Firemen by virtue of the overlapping interests of the two crafts.

Rather, the Firemen's claims fall within the well-established jurisdiction of the federal courts to compel compliance with the procedures set forth by the Railway Labor Act for changing agreements affecting rates of pay, rules, or working conditions. *See, e.g., Florida East Coast Ry. Co. v. Brotherhood of Railroad Trainmen*, 5th Cir. 1964, 336 F.2d 172, 179; *Manning v. American Airlines, Inc.*, 2d Cir. 1964, 329 F.2d 32, 33; *Railroad Yardmasters of America v. Pennsylvania Ry. Co.*, 3d Cir. 1955, 224 F.2d 226. Section 2, Seventh provides that "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 [Section 6] of this title." 45 U.S.C. § 152, Seventh. Section 6 requires thirty days' written notice of "an intended change in agreements" and proscribes changes in agreements pending the completion of the procedures of the Act.[3] *See generally Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 37 U.S.L.W. 4247, 4249 (U.S. March 25, 1969). Judicial inter-

[3]Section 6, 45 U.S.C. § 156 provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

vention to enforce these explicit statutory commands is not incompatible with the Act's emphasis on conciliation, mediation, and arbitration, since its function is to compel the exercise of these voluntary processes. Consequently, the propriety of a judicial decree to insure that contracts under the Act remain in effect until the procedure for change has been exhausted is well established. *Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, D.C. Cir. 1964, 337 F.2d 127, 132; *Manning v. American Airlines, Inc.*, *supra*.

This Court's decision to that effect in *Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America*, 5th Cir. 1959, 269 F.2d 726, is squarely in point. In that case, the Switchmen's Union had been duly certified as bargaining representative for the craft of yardmen on the carrier, thereby replacing the Trainmen in that capacity. The Switchmen gave the railroad a Section 6 notice to change the old Trainmen agreement and a new contract between the Switchmen and the carrier resulted. No Section 6 notice was given the Trainmen. The Trainmen (BRT) and Conductors (ORC&B) then brought suit and challenged the validity of the agreement formulated by the Switchmen and the railroad on the ground that the carrier had not served a Section 6 notice. This Court, as to jurisdiction of the lower court to consider such a controversy, wrote:

> In a consolidated proceeding the District Court held the SUNA contract valid. BRT and ORCB appeal, contending that the agreement is invalid and its enforcement should have been enjoined. Admittedly no Section 6 notice was given by the Railroad to BRT and ORCB, and, if required, the contract is invalid, leaving the prior agreements (or practices) in effect. All are in agree-

> ment, with which we concur, that the case poses a genuine issue as to validity, not interpretation, so that on these and other authorities, it is one for judicial consideration.

Id., 269 F.2d at 728-29; *accord, McElroy v. Terminal Railroad Assn.*, 7th Cir. 1968, 392 F.2d 966, 970. The same basis for jurisdiction is present here. The Firemen contend that the contested agreement alters the substance of agreements to which they are a party, that they were entitled to Section 6 notice of the contemplated changes, and that the new agreement is therefore invalid for want of notice and conference. It cannot matter that the Firemen's claim may fail on its merits; jurisdiction exists to decide the case either way.

Nor are the district courts without jurisdiction, as the majority suggests, because "validity of the contract depends upon the merits of a representation dispute." *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 4th Cir. 1962, 298 F.2d 17, 20; *Brotherhood of Ry. and Steamship Clerks v. United Air Lines, Inc.*, 6th Cir. 1963, 325 F.2d 576. The validity of the contract depends instead upon the requirement of a Section 6 notice of change. "[I]f required, the contract is invalid." *Order of Ry. Conductors and Brakemen v. Switchmen's Union of North America, supra* 269 F.2d at 728. Resolution of that issue may involve a determination of the scope and viability of the agreements the Firemen contend were unlawfully altered without notice and conference. But the adjudication of a representation dispute, as heretofore established, is not involved inasmuch as the zones where the two unions have joint authority have been defined in the agreements entered under the auspices of the Mediation Board. The district courts, in order to decide if the Fire-

men were entitled to notice, need only look to the tripartite agreements which the Firemen seek to preserve. In short, this case presents the same justiciable issues involved in any suit brought to compel compliance with the procedures set forth by the Act for the orderly change of agreements. It can make no difference that tripartite agreements between two unions and a carrier, rather than the typical bi-lateral agreements between a single union and a carrier, are involved. These plainly constitute "agreements" within the meaning of Section 2, Seventh and Section 6. Therefore, it seems clear that if prior to the merger, the carrier (ACL) and the Engineers had changed the substance of the tripartite agreements, the Firemen could have challenged the validity of any new agreement in federal court.

The question remains whether the merger of the two carriers requires a different holding. Appellees contend, and the majority seems to agree, that the separate pre-merger employee protection agreements providing for negotiations "in each craft" have superseded the tripartite agreements. The Firemen, it is argued, have contractually committed themselves to deal solely with the merged carrier in two-party negotiations, thereby wiping out their former right to tripartite negotiation and agreement. The Engineers and the carrier are likewise committed to two-party negotiations and agreement without the Firemen. It inevitably follows, therefore, that in claiming the right to confer with both the carrier and the other union, the Firemen have raised a jurisdictional dispute within the exclusive jurisdiction of the Mediation Board. Under this theory, the situation is the same that would have existed had there never been tripartite agreements. On the other hand, the pre-merger protection agreements, which allegedly supersede the former agreements, also provide that "the Merged Company will take over and assume all con-

tracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations . . . and will be found by the terms and provisions thereof . . . ." This provision would appear to carry the old agreements forward until changed in the manner prescribed by the agreements or by the Act. Thus, while it is possible, as the majority suggests, that the protective agreements contemplated only two-party negotiations — "in each craft" — and that the Firemen waived their rights to tripartite agreement, it is also possible that the old contracts are still viable. Either way, it is quite plain that *this is a triable issue.* The Firemen should not be shut out of court on the untried, unproven assumption (on the merits) that the formal Mediation Agreement and tripartite agreements died with the merger. On its face, the claim presented by the Firemen predicated on these agreements is justiciable. Their contentions at least warrant a finding by a lower court whether the Mediation Agreement and tripartite agreements are viable documents.

The appellees argue further that by virtue of the merger, the procedures of the Railway Labor Act are inapplicable. The argument is that Section 5 (11) of the Interstate Commerce Act, 49 U.S.C. § 5 (11), relieves the merged company from the restraints and limitations of the Railway Labor Act which would prevent effective consummation of the merger.[4] *See Brotherhood of Loco-*

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[4]Section 5(11), 49 U.S.C. § 5(11) provides in pertinent part:

> The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power to carry such transaction into effect . . . and *shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law,* Federal, State, or municipal, insofar as may be *necessary* to enable them to carry into effect the transaction so approved . . . . (Emphasis added)

motive Engineers v. Chicago & N.W. Ry. Co., 8th Cir. 1963, 314 F.2d 424. Accordingly, the Firemen's claims predicated upon the Railway Labor Act afford no ground for relief. The Firemen, on the other hand, emphasize that Section 5 (11) of the Interstate Commerce Act limits the relief merged carriers have from other federal statutes to the extent "necessary to enable them to carry into effect the transactions so approved." Relief from the procedures set forth in the Railway Act for changing existing agreements, the Firemen argue, is not "necessary" to the effectuation of the merger, and therefore Section 6 controls. *See Texas & N. O. Ry. Co. v. Brotherhood of Railroad Trainmen*, 5th Cir. 1962, 307 F.2d 151. But this issue, like that posed by the protection agreements entered prior to the merger, should be developed in one of the courts below in a trial upon the merits. *See id.* at 158.

In summary, I would hold that this controversy falls within the well-established jurisdiction of the federal courts to insure compliance with the procedure prescribed by the Railway Labor Act for changing agreements. The courts are not required here to determine which of the two unions, if not both, the carrier is to treat with on the issues in dispute. The Mediation Agreement and the tripartite agreements entered under the auspices of the Mediation Board have resolved that question. A jurisdictional dispute, requiring adjudication of the bargaining authority of the two unions, is therefore not involved. Although the merger of the two carriers, as the majority seems to suggest, may vitiate the Firemen's claims, either because the tripartite agreements died with the merger or because the Interstate Commerce Act relives the carrier of obligations imposed by the Railway Labor Act, this is an issue that should be developed in a trial on the merits.

APPENDIX B

Judgment of the United States Court of Appeals for the Fifth Circuit in Case No. 26043, Rendered June 4, 1969:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26043

D. C. Docket No. Civ. 68-41-J

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Appellants,

versus

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY and DYER, Circuit Judges, and KEADY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

THORNBERRY, Circuit Judge, dissents. June 4, 1969

Issued as Mandate: June 27, 1969.

APPENDIX C

Judgment of the United States Court of Appeals for the Fifth Circuit in Case No. 26044, Rendered June 4, 1969:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26044

D. C. Docket No. Civ. 68-101-JE

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Appellants,

versus

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY and DYER, Circuit Judges, and KEADY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

THORNBERRY, Circuit Judge, dissents. June 4, 1969

Issued as Mandate: June 27, 1969.

APPENDIX D

Order Denying Motion For Intervention, dated February 5, 1968, in Brotherhood of Locomotive Engineers v. Seaboard Coast Line Railroad Company, Case No. 68-41-Civ.-J, U.S. District Court for the Middle District of Florida, Jacksonville Division:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 68-41-Civ-J

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
a labor organization,

Plaintiff,

v.

SEABOARD COAST LINE RAILROAD
COMPANY, a corporation,

Defendant.

ORDER

On January 30, 1968, this Court entered a preliminary injunction ordering defendant, Seaboard Coast Line Railroad Company, to place into effect forthwith certain merged seniority rosters agreed upon by the Railroad and by the Brotherhood of Locomotive Engineers, plaintiff herein.

A Motion for Intervention was filed by the Brotherhood of Locomotive Firemen and Enginemen and certain individual employees of defendant. Movants assert a legal interest in the subject matter of the suit and seek to intervene under Fed. R. Civ. P. 24(a)(2). A hearing on the Motion was held on February 2, 1968.

Movants assert that the agreement ordered implemented by this Court affects all the members of the union they represent because of the high degree of mobility between the firemen and engineers. Where a union has demonstrated itself to be the exclusive bargaining agent for a craft, as has the plaintiff herein, the mere fact that an agreement it enters into "affects" members of other crafts and unions is not enough to give those interested parties the right to contest that agreement. *Order of Ry. Conductors & Brakemen v. Switchmen's Union of No. Amer.*, 269 F.2d 726, 732 (5th Cir. 1959).

Movants have attempted to demonstrate that many of the items contained in the agreement in question are matters which should have been negotiated by them for their members, rather than by the BLE, or that these matters should have been concluded by a tri-party agreement. This overlapping of interests between the two crafts merely demonstrates the existence of a jurisdictional dispute between the parties and does not give Movants the right to intervene in this action. A jurisdictional dispute of this type is a matter which falls within the exclusive jurisdiction of the National Mediation Board and precludes federal district court jurisdiction. *General Comm. of Adj. of the BLE for the M-K-T R.R. v. M-K-T R.R.*, 320 U.S. 323 (1943).

Therefore, it is

ORDERED that Motion for Intervention is denied.

DONE AND ORDERED at Jacksonville, Florida, this 5th day of February, 1968.

WM. A. McRAE, JR.
Judge

Copies to counsel

APPENDIX E

Final Judgment dated April 4, 1968, in Brotherhood of Locomotive Firemen and Enginemen v. Seaboard Coast Line Railroad Company et al., Case No. 68-101-Civ.-JE, U.S. District Court for the Southern District of Florida, Miami Division:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 68-101-Civ.-JE

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Plaintiffs,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation, et al.,

Defendants.

FINAL JUDGMENT

This Court having previously granted the Defendants' Motions to Dismiss the Plaintiffs' Complaint, with leave to the Plaintiffs to amend their Complaint, and the Plaintiffs having elected to stand on their original Complaint it is,

ORDERED AND ADJUDGED, that the Complaint and this cause be, and the same are hereby dismissed, and the Defendants shall go hence without day.

DONE AND ORDERED at Miami, Dade County, Florida, this 4 day of April, 1968.

JOE EATON
U. S. District Judge

APPENDIX F

Order of Mr. Justice Black Extending Time For Filing Petition For Writ Of Certiorari To And Including September 12, 1969:

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1969

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Petitioners,

vs.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 12th, 1969.

S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 3d day of September, 1969.

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in the

Supreme Court

of the

United States

October Term, 1969

No. 585

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, et al,

Petitioners,

vs.

SEABOARD COAST LINE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

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In the Supreme Court of the United States

October Term, 1969

No. 585

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, et al,

Petitioners,

vs.

SEABOARD COAST LINE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a federal district court possess jurisdiction under this Court's holding in *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943), to determine whether particular issues are within the jurisdiction of either the certified exclusive collective bargaining representative for firemen or engineers or both, where a merger has combined two carriers, one having bilateral agreements with the engineers and firemen concerning these issues, one having tripartite agreements concerning these issues, and where the carrier and each of the unions have separately agreed to negotiations "in each craft" as the mode for merging the collective bargaining agreements?

2. Where two carriers have merged to form a new carrier, and the certified exclusive collective bargaining representatives for the crafts of firemen and engineers have separately agreed pursuant to §5 (2) (f) of the Interstate Commerce Act to a *mode* of merging their prior collective bargaining agreements different than the mode provided under the Railway Labor Act, does a federal district court possess jurisdiction to adjudicate claims by the firemen's representative of a right to notice, participation in negotiations and a veto over any agreement reached between the engineers and the merged carrier based upon the procedures of the Railway Labor Act which it has agreed are inapplicable?

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the facts of this case, representing them to be "basically simple", although admitting to their "surface complexity", (Petition, p. 5) does not adequately present to this Court the unique factual pattern out of which this case arose. This pattern, involving a railroad merger, consummated pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. §5, and the unique provisions of the separate bilateral employee "Protective Agreements" entered into by the carriers prior to the consummation of the merger with each of their unions, is not likely to be repeated.

The simplistic approach to the facts taken by the petitioners is clearly deliberate, for the first question which they submit as presented by the Petition ignores the merger and ignores the "Protective Agreements" which are the primary factors in the case and in the decisions below. No question of importance is presented by this unique factual pattern, the Courts below have correctly resolved the issues which are, in fact, presented, and the decision is not in conflict with any decision of this Court or of another Court of Appeals.

Because of the importance of the facts to this case we shall state them with some detail.

A. *Background of the Merger*

The ACL and SAL[1] entered into a Plan of Merger

[1]The abbreviations to be used in this Brief will be consistent with those used in the Petition, Atlantic Coast Line Railroad Company: ACL; Seaboard Air Line Railroad Company: SAL; Seaboard Coast Line Railroad Company: SCL; Brotherhood of Locomotive Firemen and Enginemen: BLF&E; Brotherhood of Locomotive Engineers: BLE. All emphasis will be added unless designated to the contrary.

dated May 19, 1960 and filed a joint application for merger with the Interstate Commerce Commission, which was identified as Finance Docket No. 21215 (R. Vol. I 75). The Interstate Commerce Commission by Order dated December 13, 1963 approved the merger, 320 I.C.C. 122. As a condition of approval of the merger, the Interstate Commerce Commission imposed protective conditions for the benefit of affected employees pursuant to Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), similar to those imposed in *Southern Railway Co.—Control-Central of Georgia Railway Co.*, 317 I.C.C. 557.

The Florida East Coast Railroad, the Railway Labor Executives' Association (RLEA) and others appealed the ICC decision to a three-judge district court. *Florida East Coast Ry. Co. v. United States*, 242 F.Supp. 14 (M.D. Fla. 1964). The District Court set aside the order of the ICC based upon the Clayton Act, not reaching the question of the adequacy of the employee protective conditions. This Court reversed and remanded the case to the three-judge district court, *Seaboard Air Line R. Co. v. United States*, 382 U.S. 154 (1965). The district court, on remand, approved the merger and the employee protective conditions previously imposed by the ICC.

Deeming the *Southern-Central* conditions inadequate for the protection of the employees they represented, the unions filed another appeal from the District Court's decision to this Court. Case No. 640, O. T. 1967. Simultaneously the unions were negotiating with the carrier to achieve a greater measure of security for the affected employees. These negotiations resulted in two separately negotiated and separately executed protective agreements. The first, executed on November 3, 1966, was entitled

"Agreement for Protection of Employees in Event of Merger of Seaboard and Coast Line Railroads" (R. Vol. I, 89-109), and included within its scope all employees represented by the 17 separate organizations who were members of the Railway Labor Executives Association (RLEA). This agreement included the crafts of firemen and hostlers represented by the petitioner BLF&E. This agreement by its terms specifically provided that:

> "It shall be considered and construed as a *separate agreement* between the Seaboard, Coast Line and *each* of the labor organizations signatory hereto." (Section 7(b), R. Vol. I, 100)

The second agreement entitled "Agreement for Protection of Employees represented by the Brotherhood of Locomotive Engineers in Event of Merger of Seaboard and Coast Line Railroads" (R. Vol. I, 110-122) was executed on November 10, 1966 between the carriers and the respondent BLE for employees in the engineers craft.

As a part of these protective agreements (sections 7(b), R. Vol. I, 84, 99) the labor organizations agreed to dismiss their appeals then pending before this Court. Such appeals were withdrawn and on April 10, 1967 this Court gave final approval to the merger, 386 U.S. 544 (1967), which was then consummated on July 1, 1967.

B. *The Protective Agreements*

In any situation where carriers merge to form a new entity, it becomes necessary to combine the collective bargaining contracts and seniority districts and rosters pre-

viously in effect upon the former carriers into a unified agreement, districts, and roster for the merged carrier. On the former ACL and SAL, the BLE was the collective bargaining representative, certified as such by the National Mediation Board, for the craft or class of engineers. (R. Vol. I, 16-17). The BLF&E occupied a similar position on both former carriers with respect to the craft or class of firemen and hostlers (R. Vol. I, 75). Each organization had collective bargaining agreements concerning rules, rates of pay and working conditions, hereafter called Schedule Agreements, in effect with the former carriers.

The merger required change, and the *mode* of change was intended to be, and was provided in the Protective Agreements:

> "The fundamental scope and purpose of this Agreement is . . . (c) *to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in services, facilities and operations involved in such merger.*" (R. Vol. I , 93, 112).

The employee representatives *in each craft* including BLF&E, and the carrier agreed in Section 3(b) of its Protective Agreement, as follows:

> "The merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations signatory hereto concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said merger and will be bound by the terms and pro-

visions thereof, *and such agreements will be merged into new agreements through negotiations covering all employees of the Merged Company IN EACH CRAFT with consolidation of seniority rosters and seniority districts for each class and craft of employees.* (R. Vol. I, 96-97).

The separate Protective Agreement with the BLE similarly provided for merger of agreements "* * * through negotiations covering all employees of the Merged Company IN EACH CRAFT with consolidation of seniority rosters and seniority districts for engineers." (R. Vol. I, 113). Thus, negotiations "in each craft" were separately agreed upon by the BLF&E and the carrier in its Agreement and between BLE and the carrier in its Agreement as the exclusive mode by which the parties were to arrive at new agreements, districts, and rosters.

Appendix F to the BLF&E Agreement (R. Vol. I, 106) and Appendix D to the BLE Agreement (R. Vol. I, 118) each provide a "Memorandum of Understanding" regarding notices of changes under the Agreements. These Memoranda, by agreement of the parties, *alter* the scheme of change provided by the Railway Labor Act, 45 U.S.C. §151 et seq., as to "* * * intended changes contemplated because of the merger of the Seaboard and Coast Line * * *". (R. Vol. I, 106, 118). As to such changes, and "* * * any dispute or controversy * * * with respect to the interpretation or application of any provisions of this Agreement, or of any implementing agreement * * *" (R. Vol. I, 98, 114), binding arbitration is provided in accordance with Section 4 of the Protective Agreements, and the "* * * issues submitted for determination shall not include any question as to the right of the carrier to make operational changes * * *". (R. Vol. I, 106, 118).

Pursuant to the duties undertaken by the parties in their separate Protective Agreement, representatives of the BLE and the SCL met over a period of many months and, choosing between the provisions of the two former schedule agreements those most advantageous to the employees and the carrier, they hammered out a new Schedule Agreement for the craft of engineers together with 6 "implementing agreements" (R. Vol. I, Exhibit C to Complaint with appendices) governing the merger of seniority rosters and districts on the new carrier. Upon agreement of the parties these agreements were to become effective on January 16, 1968 (R. Vol. I, 31). Based upon a threat by the BLF&E to either sue or strike or both if the agreements were placed into effect BLE and SCL agreed to postpone the effective date to January 23, 1968, (R. Vol. I, 32). In the interim unfounded "Brush-fire" litigation began to break out across the south to prevent the implementation of the agreement reached between BLE and the carrier.[2]

With rumors and threats of additional litigation rife, the SCL declined to make the BLE agreements effective, and a week passed after the agreed implementation date. BLE, therefore, brought suit in the Middle District of Florida, where the District Court which had reviewed the

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[2]Suits were initially commenced by individuals against BLE and SCL in the Superior Court of Chatham County, Georgia, and the Court of Common Pleas, Florence County, South Carolina. After the initial issuance of ex-parte temporary restraining orders, in each instance the courts dissolved these orders after some delay.

Subsequent to the Jacksonville and Miami litigation involved below, additional suits were brought in the federal court in Richmond, Virginia and the state court in Birmingham, Alabama. The unsuccessful Georgia litigants also filed a complaint with the ICC. The ICC dismissed the complaint by Order dated June 10, 1968 holding that the complaints were the subject of binding arbitration provided in the protective agreements

entire merger proceedings was located, in order to compel the implementation of the agreements, covering engineers, which had been freely and laboriously reached pursuant to the Protective Agreement between the carrier and the certified exclusive collective bargaining representative for the craft of engineers.

BLE filed its complaint January 29, 1968, and obtained an emergency hearing the following day from Judge William McRae who had been a member of the 3 judge panel which had reviewed the entire merger proceedings. After hearing (R. Vol. I, 13-65) the Court made Findings of Fact and Conclusions of Law (R. Vol. I, 66-70) and entered a Preliminary Injunction dated January 30, 1968, (R. Vol. I, 71-72) requiring the SCL to place the agreements into effect throughout the SCL system with the exception of the No. 2 Eastern Seniority District where implementation was then enjoined by the South Carolina Court of Common Pleas. The South Carolina injunction was later dissolved and implementation completed throughout the SCL system.

On the same day, January 30, 1968, the BLF&E and certain individuals filed suit in Miami seeking to enjoin the implementation of *all* of the engineers agreements. In its two count complaint (R. Vol. II, 8-31) the BLF&E purported to invoke the jurisdiction of the court based upon the Railway Labor Act and claimed that certain provisions of the new engineers Schedule Agreement (Exhibit 6) were inconsistent with former ACL tripartite provisions in the former engineers and firemen contracts (Exhibits 3, 4) and that no formal notice under Section 6 of the Railway Labor Act 45 U.S.C. §156 had been given to BLF&E in this connection (R. Vol. II, 12-19, paragraphs 9-20).

Therefore, since BLF&E had not itself yet reached agreement with the carrier on a new firemen's agreement, BLF&E contended that BLE and the carrier could not implement the new engineers agreements. BLF&E sought an injunction to prevent such implementation.

In Count II of the Complaint the individual plaintiffs were alleged to represent a large group of former SAL employees with seniority "* * * as road firemen and road engineers." (R. Vol. 11, 21). These employees were then alleged to have been "* * * discriminated against * * * needlessly and unjustly", (R. Vol. II, 26), because the new engineers agreement did not adopt the dual system of separate yard and road seniority for engineers which had prevailed on the former SAL. These individuals similarly sought an injunction to prevent implementation of the engineers agreements. A hearing was set for February 8, 1968.

In the meantime the BLF&E and the individuals who had filed the Complaint in Miami sought to intervene in the pending action in Jacksonville to assert the same contentions which they had raised in Miami (compare R. Vol. I, 74-86 with R. Vol. II, 8-29). After hearing on February 5, 1968, the District Court for the Middle District of Florida per Judge William McRae entered an Order (R. Vol. I, 41-43) denying intervention, in which the Court determined that the proposed intervenors lacked legal standing to intervene in order to assert their contentions, and that their contentions involved matters over which the Court lacked jurisdiction.

The defendants in the Miami action, SCL and BLE, filed Motions to Dismiss the complaint based upon lack

of jurisdiction in the District Court, failure to state a claim upon which relief could be granted, and res judicata based upon the determination of the District Court for the Middle District of Florida. (R. Vol. II, 32-33, 46-50)

After hearing on February 8, 1968, (R. Vol. II, 50-72) the Miami Court entered an Order (R. Vol. II, 107) granting the defendants' Motions to Dismiss the complaint and allowing the plaintiffs 20 days within which to amend their complaint. Thereafter the plaintiffs filed an Election to stand on the complaint, which resulted in the entry of a Final Judgment by the District Court. (R. Vol. II., 110).

Appeals to the Court of Appeals, Fifth Circuit were taken in both cases, which were consolidated. The Court affirmed the decisions below, Circuit Judge Thornberry dissenting. *Brotherhood of Locomotive Firemen and Enginemen v. Seaboard Coast Line R.R. Co., et al.*, 413 F.2d 19 (5th Cir. 1969).

REASONS FOR DENYING THE WRIT

The decisions of the Courts below premised upon the factors of a railroad merger and the unique provisions of the "Protective Agreements" present no question worthy of review by this Court.

The fact of the matter is that this case involves nothing more than the anguished outcries of a labor organization, petitioner BLF&E, which finds itself uncomfortably hoist on a petard of its own making, the separately negotiated, separately concluded, and separately construed[3] Protective

[3]See, BLF&E Protection Agreement (Section 7(a), R. Vol. I, 100).

Agreement which it solemnly concluded with the carriers involved prior to their merger. No novel principles of National or lesser importance are involved in this case, which rests upon a principle conclusively determined by this Court 26 years ago in *General Committee of Adjustment of BLE v. Missouri-Kansas-Texas RR. Co.*, 320 U.S. 323 (1943) and its companion case *General Committee of Adjustment of BLE v. Southern Pacific R.R. Co.*, 320 U.S. 338 (1943).

In those cases identical disputes arose over who was the proper employee representative, BLE, BLF&E, *or both of them*, for the negotiations of certain rules governing the calling of individuals for emergency engineers work and demotion of engineers to be firemen. In the *M-K-T* case the carrier had concluded an agreement with the BLF&E concerning these matters, and the BLE brought an action for a declaratory judgment that it was the exclusive representative of engineers and that the agreement between BLF&E and the carrier was consequently invalid. The carrier sought a declaration of the rights of the parties and the BLF&E sought a declaration of the validity of the agreement. The District Court dismissed the complaint holding that the carrier could contract with either BLE or BLF&E on these issues. The Court of Appeals, Fifth Circuit, reversed, holding that both BLE and BLF&E had an interest in the controversy, that all parties should meet and, if possible agree, and that in the absence of such agreement the carrier could terminate the BLF&E agreement. 132 F.2d 91. (5th Cir. 1943) On certiorari this Court reversed, in a broad holding clearly indicating the lack of jurisdiction in the courts to resolve disputes of this nature.

"It is our view that the issues tendered by the present litigation are not justiciable- that is to say that Congress by this Act has foreclosed resort to the Courts for enforcement of the claims asserted by the parties."

* * *

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of §2 Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdicitional disputes between unions or between groups of employees. H. Rep. No. 1944 Supra, p. 2; S. Rep. No. 1065, 73rd Cong., 2d Sess., p. 3. *However wide may be the range of jurisdictional disputes embraced within §2 Ninth Congress did not select the courts to resolve them.*" 353 U.S. at 327, 336.

The complaints of the BLF&E below are precisely the same as those determined to be non-justiciable by this Court in *M-K-T. Accord, General Committee of Adjustment for BLE v. Southern Pacific Co.*, 320 U.S. 338 (1943); *Division No. 14, Order of R. Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir. 1962). Petitioners' argument to the contrary is based solely upon the fact that on *one* of the pre-

merger carriers, certain tri-partite provisions were in effect as a part of the BLE and BLF&E agreements, governing certain of these disputed issues. Petitioner asserts that as a result of these few tri-partite provisions the jurisdictional disputes concerning these issues were "solved" (apparently for all time, for all carriers, and regardless of any other circumstances) and that no such dispute is therefore presented under the facts of this case.

The flaw in this argument is, of course, as clearly pointed out by the Court of Appeals below, that the merger of the carrier upon which these agreements were in effect with a carrier which had no such agreements, and the separate "Protective Agreements" entered into in anticipation of the merger, have necessarily and substantially altered the situation.

As stated by the Court of Appeals below:

> * * * [A] mereger by its very nature requires changes in the status quo. Were it otherwise, the employee protective agreements negotiated by both the Firemen and the Engineers would have been unnecessary. Here the merger required a consolidation of the rights of the Firemen and the Engineers on the constituent railroads, with a merger of conflicting rights of each union as against the merged railroad and vis-a-vis the other union. The Engineers have consolidated their prior agreements through a new agreement which on its face applies only to engineer employees, although it indirectly affects fireman employees. The negotiations through which the agreement was reached were held bilaterally, as the separate employee protective agreements by

providing for negotiations "in each craft" obviously contemplated and the principle of exclusive representation would seem to require. *See Virginian Ry. v. System Federation No.* 40, 1937, 300 U.S. 515, 548; *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 8 Cir. 1963, 314 F.2d 424, 431." 413 F.2d at 25.

Recognizing the merger and the "Protective Agreement" as having irrevocably altered the pre-merger situation, the Court of Appeals below appropriately held:

> "This Court cannot say that simply because portions of the subject matter of the Engineers-Seaboard agreement formerly were the subject matter of tripartite agreements they necessarily must remain the subject of tripartite negotiations following merger. * * * Underlying the issue of whether the provisions of the Engineers-Seaboard agreement should be in a two-party or a three party agreement, having been in bipartite agreements on one constituent railroad and tripartite agreements on the other prior to the merger, is the necessity of determining whether the provisions are within the jurisdiction of one union or the other or both, for the provisions are not beyond dispute within the jurisdiction of one bargaining representative or the other. Only the National Mediation Board has jurisdiction to resolve this underlying issue. Thus the asserted "invalidity" of the Engineers-Seaboard agreement depends upon the determination of a jurisdictional dispute between two railway labor organizations, a matter which a district court has no jurisdiction to decide." 413 F.2d at 25.

Respondent BLE submits that this jurisdictional holding by the Court of Appeals below is clearly correct, and presents no issue which would justify review on certiorari by this Court. In an abundance of caution, however, respondent will also answer the merits of petitioners' arguments, which are, in fact, similarly groundless as a result again of its own action in executing the BLF&E Protective Agreement.

Petitioners' entire merits argument[4] is dependent upon the assertion that the "mandatory procedures * * * of the Railway Labor Act governing the alteration of existing labor agreements" (Petition, p. 3) are applicable to this case and have been violated by the action of respondents in negotiating and concluding the BLE-SCL agreements without a Section 6 notice having been served on BLF&E. In ordinary circumstances Section 6 procedures[5] provide the *mode* by which existing collective bargaining agreements under the Railway Labor Act must be changed. The circumstances in the present case, however, are decidedly not ordinary. The flaw in the petitioners' argument here, as in its argument on jurisdiction, is that, by its own action in entering into its "Protective Agreement", the Railway Labor Act Section 6 procedures upon which it relies have been rendered inapplicable.

As pointed out in the statement of the case above, the two Protective Agreements here involved are perfectly explicit in stating:

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[4]With the exception of their afterthought position on "Voluntary" arbitration, dealt with below.

[5]Section 6, 45 U.S.C. §156; Section 2, Seventh, 45 U.S.C. §152, Seventh.

> *The fundamental scope and purpose of this Agreement is* * * * *(c) to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in services, facilities and operations involved in such merger.* (R. Vol. II 77, 96).

BLF&E and BLE in these Protective Agreements, agreed separately with the carriers that in the event of merger of the carriers the mode of negotiations to reach the merged collective bargaining agreements necessitated thereby would "be * * * *negotiations* covering all employees of the Merged Company *in each craft*, with consolidation of seniority rosters and seniority districts for each class and craft of employees." (R. Vol. II 81, compare R. Vol. II 97). No provision was made in these Protective Agreements for tripartite negotiations, and BLF&E freely contracted for this mode of negotiation.

The ordinary scheme of procedures to change agreements under the Railway Labor Act are set forth in the Petition at page 11. This involved scheme of written notice of requested change, negotiation, mediation, proffered arbitration, Presidential Emergency Board, and finally self-help, while admirably suited to the ordinary collective bargaining problems which arise in the industry is not so well suited to the problems which arise in the context of a merger where two separate contracts must be merged to form one, and consolidation of seniority rosters and districts becomes essential.

For the changes necessitated by the merger of the ACL and SAL, the carriers and the unions *agreed on the procedures which would be followed in the Protective*

Agreements. These agreements, which provide modes of change different than those prescribed in the Railway Labor Act are specifically sanctioned by the Act.

Section 2, Seventh of the Railway Labor Act, 45 U.S.C §152, Seventh provides as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements *except in the manner prescribed in such agreements* or in Section 156 of this title."

It is clear then that the Railway Labor Act itself contemplates that the parties can agree to a manner of changing agreements different from that prescribed in Section 6 of the Act. This is precisely what the parties did in the *Protective Agreements.* Compare, *Brotherhood of Locomotive Engineers v. Chicago Northwestern R. Co.*, 314 F.2d 428 (8th Cir. 1963), *Cert. den.* 375 U.S. 819 (1963).

The BLF&E, however, has premised its complaints and the alleged jurisdiction of the Courts below upon the fact that it did not receive a Section 6 Notice, although it has agreed to a different mode of change.

Finally the answer to BLF&E's argument that Section 6 procedures of the Railway Labor Act were applicable under the circumstances of this case is provided by its own admission that the Protective Agreements *did,* in fact, provide the mode for the merger of agreements with *compulsory* arbitration being provided for its disputes with the carrier. Petition, p. 16.

The significance of this admission is that under Section 6 procedures neither party to a "major dispute" under the Railway Labor Act, *Elgin J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945), can be required to submit the dispute to compulsory arbitration, *Brhd. of Locomotive Engineers v. Baltimore & O. R. Co.*, 372 U.S. 284 (1963). In its Protective Agreement on the other hand, BLF&E agreed to compulsory arbitration to resolve its disputes with the carrier over "* * * changes contemplated because of the merger." (R. Vol. I, 106). In asserting that the decisions of the Courts below "frustrated" the compulsory arbitration which was provided in its Protective Agreement BLF&E has underlined the applicability of these procedures, rather than the Section 6 procedures, for resolving its disputes with the carrier in merging its own agreements.

Clearly as an afterthought, BLF&E for the first time in this case in the Petition has seized upon their arbitration clause and makes the assertion that "tri-party arbitration" had been "agreed upon by all three parties" all along. (Petition, pp. 16-17). This novel assertion appears nowhere in the record of this case, nowhere in petitioners' pleadings, and nowhere in previous briefs or arguments.

Of course, it is perfectly plain that the separate "Protective Agreements" nowhere contemplate "tri-party arbitration". If they did, why has BLF&E never made any effort to invoke arbitration or to assert its claim for such arbitration prior to its Petition for Certiorari to this Court? The Petition lamely complains that the decisions of the Courts below refusing to resolve the underlying jurisdictional dispute have "frustrated" arbitration.

The federal Courts' decisions obviously could not and did not "frustrate" "tri-party arbitration" which had never been agreed, nor could these decisions affect BLF&E's right to the bilateral compulsory arbitration to which it had agreed in its Protective Agreement, in place of Section 6 procedures.

In sum Petitioners' contradictory assertions to this Court regarding the substance and effect of the decisions below provide no basis for review on certiorari by this Court. The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 585

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, T. L. McCollister, L. C. Hamilton, T. T. Jackson, Jr., Sidney Page, M. L. Williams, H. A. Stokes and B. J. Poe,

Petitioners

vs.

SEABOARD COAST LINE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

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October, 1969

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BRIEF OF RESPONDENT SEABOARD COAST LINE RAILROAD COMPANY IN OPPOSITION

QUESTIONS PRESENTED

(1) Can one union subject to the Railway Labor Act secure a Federal District Court injunction to prevent implementation of a valid labor agreement entered into between a railroad and another union also subject to the Railway Labor Act thereby evading the exclusive statutory jurisdiction of the National Mediation Board?

(2) Can a union frustrate consummation of an Interstate Commerce Commission-approved railroad merger by now insisting on Railway Labor Act procedures for changing a former tripartite agreement that the union has already agreed to bilaterally renegotiate pursuant to an employee protection agreement under Section 5(2)(f) of the Interstate Commerce Act?

STATUTES INVOLVED

While this case does involve the Railway Labor Act 45 U.S.C., as Petitioner asserts, Section 152 (Ninth) is the particular section involved. This case also involves the Interstate Commerce Act, 49 U.S.C., particularly Sections (5)(2)(f) and 5(11). The relevant section of the Railway Labor Act is as follows:

Section 152 (Ninth):

> "Dispute as to Identity of Representatives—
> Mediation Board to Designate
>
> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the

representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The relevant sections of the Interstate Commerce Act are:

Section 5(2)(f)

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four

years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

and Section 5(11):

"The authority conferred by this section shall be exclusive and plenary and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to

own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any "carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

STATEMENT

The "basically simple" facts of this case, as the Petitioner has characterized them, should be likened to an iceberg. Much more lies beneath the surface.

The merger of the Atlantic Coast Line Railroad and Seaboard Air Line Railroad that thus became the Seaboard Coast Line Railroad, while securing the approval of the Interstate Commerce Commission and this Court, has not enjoyed

the wholehearted support of the Brotherhood of Locomotive Firemen and Enginemen (Record, Vol. I, pp. 8-9) [1 & 2] . To fully appreciate how BLF&E's original opposition to the merger has evolved to this case, several events are significant.[3]

Two Employee Protection Agreements

It is a fundamental truism of railroad mergers that only when the overlapping labor contracts and duplicating labor forces of the two separate rail lines are consolidated can the merger fulfill its promise (Record, Vol. I, p. 25). Therefore, while the Interstate Commerce Commission approval was being judicially reviewed, ACL and SAL managements commenced negotiations on two *Agreements for the Protection of Employees in Event of Merger* — one agreement to be with a group of unions that included BLF&E and the other agreement to be solely with BLE (Record, Vol. I, pp. 89-122).[4]

---

[1] The following abbreviations will be used throughout:
Atlantic Coast Line Railroad—ACL
Seaboard Air Line Railroad—SAL
Seaboard Coast Line Railroad—SCL
Brotherhood of Locomotive Firemen and Enginemen—BLF&E
Brotherhood of Locomotive Engineers—BLE

[2] *Seaboard Air Line R. Co. — Merger — Atlantic Coast Line R. Co.*, 320 ICC 122 (1963), and *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (D.C.M.D., Fla., 1966), affirmed 386 US 544 (1967).

[3] A factor of equal influence arises from union organization by craft lines in the railroad industry. The alleged encroachments by one union upon another's scope of work continue to require judicial attention as exemplified by the BLE-BLF&E competition present here (Record, Vol. II, pp. 59-60).

[4] There had to be two separate and distinct Agreements because the BLE was not a member of the Railway Labor Executives' Association which represented BLF&E and virtually all other unions on the ACL and SAL. Hereafter they will be referred to as BLE Protection Agreement and BLF&E Protection Agreement, respectively.

The merging ACL and SAL recognized that they were governed by two pertinent provisions of the Interstate Commerce Act which not only sanctioned such Agreements, but, further, that the merging railroads were insulated from all other "restraints, limitations and prohibitions" of federal law.[5] Accord was reached on the BLF&E Protection Agreement on November 3, 1966.

One week later, the BLE Protection Agreement was executed. With the *ACL-SAL Merger* case pending in this Court,[6] BLF&E (through the Railway Labor Executives' Association) consented to a granting of the ACL/SAL motion to dismiss the RLEA appeal of the lower court's decision approving the merger.

These two separate Protection Agreements are, loosely speaking, in the words of the Petitioner, "virtually identical", but where distinctions do exist, they represent the factual cornerstone of Respondents' case. The relevant similarities and contrasts will be traced. Each of the respective Protection Agreements had three basic objectives defined in Section 1:

> "The fundamental scope and purpose of this Agreement is (a) to provide for the protection of defined employees of Seaboard and Coast Line as herein set forth, (b) to expedite the changes in services, facilities and operations involved in such merger, and (c) to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in service, facilities and operations involved in such merger."

---

[5] 49 U.S.C. §5(2)(f), 49 U.S.C. §5(11).

[6] Approval by this court was followed by consummation of the ACL-SAL merger on July 1, 1967. Note [2], *supra*.

Objective (a) was immediately accomplished by key language in Section 2(b) as it appears in both Protection Agreements:

> "None of the present employees of either of the said carriers shall be deprived of employment or placed in worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment."

With this promise of virtual working lifetime job security being fulfilled to many thousands of employees by means of a guaranteed monthly income, it became imperative for SCL to begin to realize the quid pro quo — merger benefits that were so far proving to be illusory (Record, Vol. I, pp. 21-26). The two merged railroads were streamlined in name only with train movements continuing along the old separate tracks because of the separate seniority rosters and separate, overlapping seniority districts which acted as a barrier to effecting rearrangement of train operations and services by SCL (Record, Vol. II, pp. 57-58).

The merged SCL needed contractual assurance that each union would expeditiously negotiate consolidated seniority districts and rosters and this obligation is embodied in Section 3(b) of the respective Protection Agreements. It is here that a meaningful divergence in the two Protection Agreements takes place. The BLE Protection Agreement provides:

> "(b) *The Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organization signatory hereto* concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said

> merger and will be bound by the terms and provisions thereof, *and such agreements will be merged into a new agreement* through negotiations covering all employees of the Merged Company *in each craft with consolidation of seniority rosters and seniority districts for engineers.*" (Emphasis supplied)

The Petitioner fails to acknowledge the key distinctions in Section 3(b) of the BLF&E Protection Agreement:

> "(b) *The Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations signatory hereto* concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said merger and will be bound by the terms and provisions thereof, *and such agreements will be merged into new agreements* through negotiations covering all employees of the merged Company *in each craft with consolidation of seniority rosters and seniority districts for each class and craft of employees.*" (Emphasis supplied)

To give further credence to the intent of the Protection Agreement framers to individually bind each separate union to the obligation to merge *all* old agreements into one new agreement "in each craft", Section 7(a) of the BLF&E Protection Agreement has the following pointed language:

> "It shall be considered and construed as a separate agreement between the Seaboard Coast Line and each of the labor organizations signatory hereto."

Because only one labor union was signatory to the BLE Protection Agreement, this provision would have been superfluous and therefore was excluded.

Since the Petitioner has now advanced an argument relating to arbitration, it should be factually noted that each of the Protection Agreements contains an arbitration clause which by its terms requires "any dispute or controversy" involving the "interpretation or application . . . of this Agreement, or any implementing agreement" between SAL, ACL or SCL "and any labor organization signatory to this Agreement" to be submitted to an arbitration committee.

[It is important at this juncture to appreciate the distinction between a Schedule Agreement and an Implementing Agreement. Both are called for by Section 3(b) of each of the Protection Agreements. A Schedule Agreement is that basic contract which defines the rules, rates of pay and working conditions of the employees of a particular craft or class. An Implementing Agreement as it relates to the merger of ACL and SAL provides for a consolidation of several seniority districts and seniority rosters into one district with one roster.]

BLE Implementing Agreement and BLF&E Opposition

Historically there has been an "ebb and flow" by railroad employees between the crafts of engineers and firemen, respectively, because of fluctuations in the railroad's business volume coupled with the availability of men to perform the work (Record, Vol. I, p. 154). On the former ACL, the former SAL, and the merged SCL the BLE was and is the sole legally constituted bargaining agent for the craft of Engineers and the BLF&E was and is the sole legally constituted bargaining agent for the craft of Firemen, both representative capacities having been certified by the National Mediation Board. To fully appreciate the bargaining rights vested in one union to represent one craft, it must be recognized that

an employee is never represented by both unions simultaneously because he works only in one craft or the other at any given moment (Record, Vol. II, pp. 58-59).

With the BLE Protection Agreement and the BLF&E Protection Agreement each providing a method for the negotiation of new Schedule Agreement in each craft, meetings between the unions and SCL Management commenced. Because there were certain provisions of the BLE Schedule Agreements on the former ACL that were tripartite in nature wherein the BLF&E had participated in negotiations and had reached agreement concerning their terms, SCL had hoped that there could be continued three-way discussion of the certain limited aspects of Engineers' and Firemen's work that had overlapping features.[7] Contrary to the allegations by the Petitioner, SCL played no part in the "breaking off" of tripartite discussions, but rather the cessation of these meetings was another manifestation of the competition existing between the BLE and BLF&E (Record, Vol. I, pp. 176-179).

Bilateral negotiations continued under what the SCL believed to be the mandate of law with representatives of the BLE and BLF&E separately and on December 19, 1967, the SCL and the BLE reached an accord on implementing agreements whereby the 31 old seniority districts for Engineers existing on the former ACL and SCL were consolidated into only six districts, with one seniority roster for Engineers in each district as provided in Section 3(b) of the BLE Protection Agreement.

---

[7] Certainly it is acknowledged that whenever two railroad crafts are competing for certain aspects of the available work and a collective bargaining agreement is negotiated between a railroad and one of the two competing unions, the other union might well be "affected". The fact remains that an employee never works in two crafts at the same time.

The BLF&E objected to the fact that SCL and BLE had reached this Agreement, and at Petitioner's request the effective date of January 16, 1968, was postponed for one week. With the effective date drawing near, two State Court suits were instituted by dissident employees, one in Savannah, Georgia, and one in Florence, South Carolina, and ex parte temporary restraining orders were issued only to be subsequently dissolved.

Prior to the dissolution of the South Carolina State Court injunction, however, the BLE in its desire to place its agreements into effect on a systemwide basis sued for a mandatory injunction in the United States District Court for the Middle District of Florida against the SCL on January 29, 1968.[8] It was the position of the BLE that it had an agreement that was fair to its members and consistent with its duty under the BLE Protection Agreement, and therefore it should be implemented. It was the position of the SCL that it had likewise negotiated this same agreement in good faith, but that with an outstanding South Carolina State Court injunction (that affected a seniority district that extended beyond that state's border into Georgia), implementation of the agreement should not be accomplished on a piece-meal basis. SCL had entered into the agreement that the BLE sought to enforce and was therefore hardly in a position to challenge its validity or legality. Its sole disagreement with the BLE involved the timing of the agreement's effective date because of pending litigation in the South Carolina Court.[9]

The District Court injunction that ordered effectuation on the implementing agreements systemwide, excepting that

[8] It is indeed intriguing to see the Petitioner complain of no notice in this suit only to later affirmatively allege that a jurisdictional dispute was not involved.

[9] An issue that was later rendered moot.

seniority district covered by the South Carolina State Court injunction, was issued on January 30, 1968. The Court concluded:

> "Where a union has demonstrated itself to be the exclusive bargaining agent for a craft, as has the plaintiff herein, the mere fact that an agreement it enters into 'affects' members of other crafts and unions is not enough to give those interested parties the right to contest that agreement. *Order of Ry. Conductors & Brakemen* v. *Switchmen's Union of No. Amer.*, 269 F. 2d 726, 732 (5th Cir., 1959)."

Also, on January 30, 1968, BLF&E sought an injunction in the United States District Court for the Southern District of Florida to restrain SCL and BLE from placing in effect the binding agreements that had been previously negotiated. BLF&E contended that tripartite provisions and a mediation agreement contained in the old schedule agreement had been breached and, further, that the Court should enjoin SCL and BLE to resume tripartite negotiations on those issues involving intercraft mobility between Engineers and Firemen. In addition, BLF&E claimed that SCL and BLE should be required to continue all tripartite agreements existing between the parties until such time as all parties signatory thereto modified them in accordance with the Railway Labor Act.

In response, SCL filed its motion to dismiss stating that BLF&E had failed to state a cause of action because in essence, the BLF&E complaint was claiming the right to a voice in another union's collective bargaining agreement. SCL asserted its duty to bargain exclusively with BLE, the union certified as the sole bargaining agent for the craft of engineers, and therefore the complaint merely demonstrated the existence of a jurisdictional dispute between BLF&E and BLE. Second-

ly, SCL contended that the District Court lacked jurisdiction over the subject matter because this was a dispute properly within the exclusive jurisdiction of the National Mediation Board. SCL also argued that the Court order in the U.S. District Court for the Middle District of Florida was res judicata because the Court found the "existence of a jurisdictional dispute between the parties."

In considering both the BLE and SCL Motions to Dismiss, the BLF&E was denied its request for a preliminary injunction by the U.S. District Court and upon the entry of a final order the BLF&E appealed to the United States Court of Appeals for the Fifth Circuit.

The Jacksonville and Miami cases were consolidated and the U.S. Court of Appeals affirmed both lower court decisions at 413 F.2d 19 (5th Cir., 1969).[10] In so deciding the Jacksonville case, the exclusive authority of the National Mediation Board to determine whether one union encroached upon another union's jurisdiction was upheld and res judicata applied to the Miami case.

ARGUMENT

While the Petitioner feels constrained to assert the "novel and important" qualities of his case,[11] the Respondents are likewise compelled to demonstrate that the questions presented by the Petitioner are actually a cloak for its insist-

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[10] As the Fifth Circuit opinion noted, if the Jacksonville decision properly barred the BLF&E effort to assert its interest in a case involving the BLE collective bargaining agreement with SCL, then "the principles of res judicata are applicable to fully litigated issues raised by a motion to intervene."

[11] The arbitration argument certainly is novel to this case since it was not seriously argued below nor even mentioned in the original complaint.

ence upon invading the exclusive bargaining sphere of Respondent BLE.

As for the suggestion that a granting of certiorari herein would have a soothing influence upon labor relations in the railroad industry, Respondent SCL recognizes that when the BLE and BLF&E are in a jurisdictional dispute, "harmonious" labor relations to one is anathema to the other. It is with full cognizance of this bitter "fact of railroad life" that Respondent SCL respectfully submits that Petitioner has failed to present any question worthy of the grant of certiorari for the reasons that follow:

A. Railway Labor Act procedures for altering collective bargaining agreements do not apply in this case.

Shorn of its embellishments, Petitioner's first argument is that a former tripartite agreement between ACL, BLE and BLF&E has survived immunities granted by the Interstate Commerce Act, 49 U.S.C § 5(11), supersession by the BLF&E Protection Agreement, and Petitioner's prior statement to this Court that it no longer opposed the merger [12] — all because of the alleged overriding quality of Section 6 of the Railway Labor Act, 45 U.S.C. §156. Respondent submits, however, that it can and will demonstrate how the old tripartite agreement was legally superseded without resort to the notice and negotiation provisions of the Railway Labor Act.

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[12] As Petitioner well appreciates, if it succeeded in this suit, the practical effect would be to force SCL to degenerate into ACL and SAL (if unscrambling an egg is possible) insofar as its more than 2000 locomotive engineers are concerned. The six BLE seniority districts would multiply into 31 and six seniority rosters would somehow have to also be expanded to 31.

1. Petitioner agreed to negotiate solely for its craft and solely with SCL.

As this Court will recall, while the appeal in the *ACL-SAL Merger* case [13] was pending herein, the railroad managements and the unions entered into two Agreements for Protection of Employees. One was the BLF&E Protection Agreement which included Petitioner and all other unions represented by the Railway Labor Executives' Association and the second was the BLE Protection Agreement which had only two signatories — the Respondents.[14] Both were pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C.:

> "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is recognized by all parties that BLF&E is *sole* legal bargaining agent for the craft of fireman and in that role BLF&E agreed that its old Schedule Agreements would "be merged into new agreements . . . *in each craft* with consolidation of seniority rosters and seniority districts *for each class and craft of employees.*" (Emphasis supplied) It must also be recognized that the BLF&E Protection Agreement was to be "considered and construed as a separate agreement between the Seaboard Coast Line and each of the labor organizations signatory

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[13] Note[2], *supra.*

[14] Curiously, if it deemed tripartite agreements so essential, BLF&E had ample opportunity to demand BLE's participation in the BLF&E Protection Agreement since it was executed one week *before* the BLE Protection Agreement.

hereto." *Petitioner had contractually committed itself to a two-party Schedule Agreement with SCL.*

Apparently Petitioner does not now desire to give meaning to the most significant words *"in each craft,"* the very language that by its only logical interpretation supersedes any second thought that tripartite negotiations or agreement should now be required. In both law and fact, the ultimate truth that can be drawn from these two separate Protection Agreements is the mandate of this Court when it defined the affirmative duty of the railroad to negotiate with the authorized collective bargaining agent who exclusively represents that craft in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937):

> "The obligation imposed on the employer by §2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of §2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" (Emphasis supplied)

Also see *Steele* v. *Louisville & Nashville R. Co.*, 322 U.S. 192 (1944) and *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945).

It is here that Petitioner finds itself in the proverbial roundhouse. The BLF&E Protection Agreement has abrogated any requirement for tripartite discussion and yet Petitioner is forced to vigorously deny the obvious — the existence of an

overripe jurisdictional dispute for which there is only one forum, the National Mediation Board.

2. *The National Mediation Board has exclusive jurisdiction over the claims of Petitioner.*

Through the oft-repeated assertion by Petitioner that the old tripartite agreement requires Railway Labor Act notice and tripartite negotiations, one persistent question looms: Whose work would the negotiations cover, Engineers' or Firemen's? If the latter, then all BLF&E had to do was negotiate bilaterally with SCL and reach an accord on the new implementing and schedule agreements covering merger of seniority districts and rosters plus work rules.[15] But if the agreement sought by the Petitioner purports to cover Engineers' work, then BLF&E has framed the classic jurisdictional dispute and in the words of the Fifth Circuit below, "the issue is not one for judicial consideration."

As stated in argument at the District Court level, "a merger situation is a different breed of cat."[16] Petitioner is, in essence, seeking a restoration of the "status quo", a much-litigated, nebulous subject. The blunt truth here, as recognized by the Court below, is that "a merger by its very nature requires changes in the status quo." Indeed, alteration of the status quo was the purpose of the BLF&E Protection Agreement.

The ACL and SAL are extinct by approval of the Interstate Commerce Commission (and, ultimately, this Court).[17] Likewise, the old BLE and BLF&E collective bargaining agreements have vanished through contractually required craft-by-craft negotiation and accord on new agree-

[15] Which they did.
[16] Record, Vol. II, p. 66.
[17] Note [2], *supra*.

ments.[18] Thereafter, whatever Petitioner seeks here must fall within the broad sphere of exclusive jurisdiction of the National Mediation Board, so well defined in this Court's trilogy of landmark cases.[19]

The case of *General Committee of Adjustment of the BLE* v. *M-K-T R. Co.*, 320 U.S. 323 (1943), has many telling factual similarities to the facts herein. In each case the BLE and BLF&E were the designated and sole bargaining agent for their respective crafts. Each union in each case had provisions in their respective agreements covering the movement, the so-called "ebb and flow", of men from Fireman to Engineer and back again. Therein, as here, a dispute arose over the method of calling demoted Engineers or returning Engineers from Fireman ranks. Petitioner disclaims applicability of this and the other *General Committee* cases,[20] but this Court plainly upheld the exclusive jurisdiction of the National Mediation Board:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different

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[18] Not on the consummation of the merger as the dissent below suggests has been Respondent's position. Quite the contrary it is recognized that the old agreements were viable until superseded bilaterally by separate agreements as required by the respective Protection Agreements.

[19] *General Committee of Adjustment, etc.* v. *Missouri-Kansas-Texas R.*, 320 U.S. 323 (1943); *General Committee of Adjustment, etc.* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943).

[20] Petitioner's Brief, pp. 13-14.

> machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of §2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees."

On the very same page of its brief, Petitioner attempts to take advantage of the Fifth Circuit's suggestion that subjects of the agreements between the Respondents may well be proper topics for negotiations between the Petitioner and Respondent SCL. As stated by the Fifth Circuit below, 413 F. 2d 19, 24, it is submitted that this would be precisely the task, the exclusive task, of the National Mediation Board.[21]

In its oblique attack on the SCL merger through this litigation, Petitioner has not only failed to cite a single case supporting its argument that involves a railroad merger — Petitioner has ignored *Division #14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4th Cir. 1962), cert. den. 369 U.S. 813 (1962), a case that *does* involve a merger and the scope of the National Mediation Board's jurisdiction. Here, an employee protection agreement had been reached as permitted by the Interstate Commerce Act, 49 U.S.C. §5 (2) (f) prior to the merger of the Norfolk & Western and Virginian Railway Companies. Disagreement arose over the merger of seniority rosters and one union local sued the parent union

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[21] While the Fifth Circuit affirmed the decision of the Jacksonville District Court that Petitioner's dispute was not "one for judicial determination", Petitioner is unhappy with the Jacksonville District Court's injunction ordering specific performance of the agreements between Respondents. Cases in support of the Jacksonville District Court's action are cited in Petitioner's Brief, page 15.

and the railroad seeking to enjoin the proposed seniority roster consolidation. The Court relied upon the *General Committee* cases and then defined its limited jurisdiction:

> "This trilogy of cases authoritatively determines that judicial intervention in railway labor disputes is restricted to the narrowest scope; that large segments of this field remain subject to the voluntary processes of conciliation, mediation and arbitration; that particularly in representation disputes the adjudicatory function has been committed by Congress to the National Mediation Board; and that the services of this Board may be invoked for the adjustment of grievances and disputes arising between a railroad and its employees concerning changes in rates of pay, rules, or working conditions not adjusted in conference and not referable to the Railroad Adjustment Board."

Significantly, the Fourth Circuit also noted that "district courts have no such authority where 'validity' of the contract depends upon the merits of a jurisdictional dispute."

Petitioner would apply the rationale of the dissent below which would not only considerably erode the jurisdiction of the National Mediation Board,[22] but, as will be seen, would cast the federal courts in the continuing role of evaluating

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[22] The very intent behind so much of the scheme of the Railway Labor Act must be ignored if Petitioner's support of the dissent below is to be embraced. The Act's inherent design is to remove railroad labor relations problems from the courts and commit them instead to Boards that are uniquely equipped with an understanding of the industry jargon in order that complex problems as presented herein by the competing unions can be resolved. *Brotherhood of Railroad Trainmen v. Toledo, Peoria & W. R.*, 321 U.S. 50 (1944).

what degree of "necessary" relief a rail merger has from other federal laws.[23]

3. *Approval of the SCL merger by the Interstate Commerce Commission relieves the railroad from restraints and limitations of the Railway Labor Act which would prevent effectuation of that merger.*

To fully appreciate the potential havoc (not "harmony") that would be generated by Petitioner's argument respecting the alleged applicability of Section 6 of the Railway Labor Act, *supra,* to the merging SCL, the logical events that might occur may be hypothetically considered. Ignoring the requirement that each union should reach separate, merged schedule and implementing agreements "in each craft" as stipulated in the BLF&E Protection Agreement, tripartite negotiations[24] between BLF&E, SCL and BLE would have continued to the inevitable impasse caused by inter-union rivalry. The time entailed in reaching the stalemate would have resulted in a tremendous dollar drain on the Respondent SCL because on July 1, 1967, it began fulfilling its part of the BLF&E and BLE Protection Agreements by its payment of guaranteed monthly wages and other numerous benefits to all employees covered by those Agreements, including individual members of the Petitioner. Simultaneously, SCL was being denied merger benefits by being compelled to operate its trains as if it were still two separate railroads since the then-existing seniority districts were wholly incompatible and the seniority

[23] 413 F. 2d 19, 30, *supra.*

[24] Theoretically, though perhaps not practically in this instance, other unions could and would assert their alleged interests in the dispute thus compounding the merger's obstacles.

rosters had not been merged pursuant to the mandate of the Protection Agreements.[25]

Continuing the proposed BLF&E "solution" to its chaotic end, the next procedure available to the parties might appear to be arbitration, but with neither union a signatory to the other's Protection Agreement containing an arbitration clause that is applicable only to signatories of the respective agreements, arbitration could be thwarted by either BLE or BLF&E.

Thus the route of the Section 6 Notice remains, but hardly as a remedy. Retaining in mind the BLE-BLF&E rivalry, it is logical to assume that *any* Section 6 Notice designed by SCL would result in dissatisfaction and counter-notices under Section 6 by one or both unions.

Then it must be assumed that the National Mediation Board would mediate, as was the case when the old tripartite agreement was ultimately executed back in 1945. But time has added one more ingredient to BLF&E's proposed "remedy" —the great likelihood of no agreement. Then a strike, a legal strike over the failure to agree becomes a distinct possibility unless the railroad were willing to abandon its pursuit of a merger in fact rather than a merger in name only.

The plain truth is that the prolonged and deliberate procedures for changing collective bargaining agreements in the Railway Labor Act simply do not "enable [carriers] to carry into effect the transaction so approved" by the Interstate

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[25] In actuality, it took approximately one year from the date of the merger's consummation to merge agreements of the more than twenty unions.

Commerce Commission.[26] Congress recognized this truism by enacting a remedy in 1940. Section 5(11) of the Interstate Commerce Act reads in pertinent part as follows:[27]

> "The authority conferred by this section shall be exclusive and plenary . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

In another merger case, also unexplained by Petitioner, *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 2d 424 (8th Cir., 1963) cert. den. 375 U.S. 819 (1963), the effect of Section 5(11) of the Interstate Commerce Act, 49 U.S.C. §5(11) upon the Railway Labor Act came into full focus. In that case, the railroad brought a declaratory judgment action against the defendant labor unions to determine the procedures to be followed in consolidating seniority rosters at its Marshalltown Yard. The C&NW had been allowed to merge with another railroad by virtue of Interstate Commerce Commission approval. Further, the C&NW and the unions had agreed to arbitrate disputes

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[26] 49 U.S.C. §5(11)

[27] Ibid.

arising out of changes that would have to be made in the old schedule agreements, but the unions took the position that the dispute at Marshalltown Yard had to be progressed under Section 6 of the Railway Labor Act. The Court considered Section 5(11) of the Interstate Commerce Act and "whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act." After quoting Section 5(11), the Court enunciated this rule:

> ". . . we believe that the cases afford very substantial support for the view that Congress intended the ICC to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of §5(11) conferring exclusive and plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law. Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of §5(11)."

Respondent SCL respectfully submits that relief from the time-consuming notice and negotiation procedures of the Railway Labor Act and the resultant disastrous effects this could visit upon the merger are, contrary to the view of the dissent, "necessary" to breathe life into the merged railroad.

B. The Exclusive Jurisdiction of the National Mediation Board must prevail over the arbitration provisions of the separate BLE and BLF&E Protection Agreements.

Since Petitioner has not indicated its two arguments are in the alternative, Respondent SCL must assume that they are presented as being consistent. They are not. Either Section 6 of the Railway Labor Act requiring notice and negotiation is mandatory or the Respondents' contention for the exclusiveness of the National Mediation Board is the law. The suggestion that "voluntary" arbitration is appropriate acknowledges the inapplicability of Section 6 in this case.[28] There are additional reasons why this argument fails.

1. Petitioner seeks an order from this Court that "voluntary" arbitration is required when he has never requested arbitration of the Respondents.

If Petitioner had any right to have his dispute arbitrated under the terms of the BLF&E Protection Agreement, written notice upon the parties is the first prerequisite of Section 4:

> "In event any dispute or controversy arises between Seaboard, Coast Line, or the Merged Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provisions of this Agreement, or of any imple-

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[28] The citation of *Transportation-Communications Employees Union* v. *Union Pacific R. Co.*, 385 U.S. 157 (1966), is curious because while the case did involve two unions disputing over one aspect of available work, the nature of arbitration was *compulsory* since it was a "minor" dispute under *existing* contracts as opposed to the alleged unilateral change of a collective bargaining agreement. No Court decision has required arbitration, "voluntary" or otherwise, of a labor dispute that commenced under Section 6 of the Railway Labor Act.

menting agreement entered into between the Merged Company and individual labor organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by said Carriers and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall, if they cannot agree on the disposition of the dispute within ten days, endeavor to select a neutral member who shall serve as Chairman, in which event the compensation and expenses of the Chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall then be paid in accordance with existing law. If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all

> parties had selected their members. The decision of the majority of the arbitration committee shall be rendered within thirty days after selection of the committee, unless the parties mutually agree to a further extension and shall be final and binding, except that in any case in which there is an unequal number of carrier and organization members on the arbitration committee, the decision of the neutral member shall be final and binding."

No notice has ever been given.

To contend that this litigation might have "frustrated" voluntary arbitration cannot operate as an excuse for the neglect in not making written request when the tripartite discussions broke down in April, 1967 (Record, Vol. I, p. 169). This litigation and the implementation of the contested agreements did not take place until January, 1968. Surely the Petitioner slept upon any arbitration rights he might have had for too long. If arbitration were possible, those ten months were the propitious time — before the posture of the prospective disputants so drastically changed by virtue of the effectuation of the negotiated agreements.

2. *Tripartite arbitration of this dispute may be impossible if either union refused to participate.*

In the same manner that Petitioner minimized the critical distinctions in other parts of the respective Protection Agreements, key aspects in the respective arbitration clauses were slighted.

The BLF&E Protection Agreement has an arbitration clause available to SCL and *"any* labor organization signatory to this Agreement."

The BLE Protection Agreement has an arbitration clause available to SCL and "*the* labor organization signatory to this Agreement."

With neither BLE nor BLF&E signatory to the other's Protection Agreement, it can be therefore contended that tripartite arbitration could be thwarted by the refusal of either BLE or BLF&E to participate since neither would be bound by the other's arbitration provision notwithstanding their many common provisions or the fact that SCL is a party to each.

The decision below, in upholding the exclusive jurisdiction of the National Mediation Board, has not detracted in any manner from the arbitration provisions of the Protection Agreements[29] or the Railway Labor Act.

CONCLUSION

Once a railroad merger has been approved and separate employee protection agreements have been reached with all involved labor unions, the merged railroad should be permitted the latitude provided by the Interstate Commerce Act to carry the transaction into effect.

Respondent SCL contends that the former tripartite agreements have been validly superseded bilaterally by agreement with the Petitioner and, further, that the notice and negotiation provisions of the Railway Labor Act are inapplicable to this case because of the Interstate Commerce Commission's approval of the merger.

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[29] An argument could be made that neither arbitration provision in either the BLE or BLF&E Protection Agreement requires arbitration of a change in the terms of an existing agreement or the writing of the terms of a new agreement. Section 4 requires arbitration "with respect to the interpretation or application" of an agreement.

The inter-union rivalry that is an integral part of this case is anything but novel and the Court below should be affirmed in its holding that the National Mediation Board provides the exclusive forum for the dispute raised by the Petitioner.

Accordingly, for the reasons stated, this petition for certiorari should be denied.

Respectfully submitted,

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